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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL, ET AL., PETITIONERS

v.

HENRY W. SEGAR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employer-defendant in a class-wide Title VII disparate treatment case who articulates a specific, reasonable employment practice to rebut plaintiffs' prima facie case of purposeful discrimination must prove the business necessity of that practice, even though plaintiffs have not alleged that the practice violates Title VII under a disparate impact theory.

2. Whether a class-wide claim of disparate treatment is established by statistical evidence that ignores published, objective civil service requirements for the positions in question.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Francis M. Mullen, Jr., the Administrator of the Drug Enforcement Administration, is a petitioner; Morris H. Davis is, with Henry Segar, a named respondent representing a class of similarly situated black special agents. A third party, Black Employees Against Discrimination In DEA, was dismissed as a plaintiff by stipulation when the plaintiff class was certified.

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The Solicitor General, on behalf of the Attorney General of the United States and the Administrator of the Drug Enforcement Administration (DEA), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., 1a-98a, *infra*) is reported at 738 F.2d 1249. The opinion of the district court (App., 99a-147a, *infra*) is reported at 508 F. Supp. 690.

JURISDICTION

The judgment of the court of appeals (App., 148a-149a, *infra*) was entered on June 22, 1984. Rehearing was denied on August 29, 1984 (App., 150a-154a, *infra*). On November 19, 1984, the Chief Justice ex-

tended the time for filing a petition for a writ of certiorari to and including January 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 717(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), provides in pertinent part:

> All personnel actions affecting employees or applicants for employment * * * in executive agencies as defined in section 105 of title 5, * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

1. A class of black special agents of DEA (including former agents and applicants for such positions) brought this action alleging violations of Title VII.[1] They alleged a variety of discriminatory employment practices, including claims regarding initial grade level assignment, promotions, and salary determinations.[2] App., 99a-100a, *infra*. At trial, respond-

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[1] Special agents are criminal investigators. Their duties include: surveillance of suspected narcotics dealers, transactions of "buys" of illegal drugs as evidence for prosecutions, development of cases for prosecution by United States Attorneys, and, in some instances, supervision of the work of other special agents. App., 101a, 103a, *infra*.

[2] Claims of discrimination in recruitment and hiring were settled prior to trial. App., 100a, *infra*. In addition to claims of disparate treatment, respondents also challenged a number of aspects of DEA's personnel practices such as initial grade assignments, work assignments, supervisory evaluations, and discipline and promotion decisions, as having a disparate impact on black agents (App., 20a, *infra*). However, respondents failed to isolate an employment selection criterion, such as an

ents attempted to prove discrimination through the anecdotal testimony of ten witnesses and statistical evidence. Both courts below found the anecdotal testimony unpersuasive. Respondents' case therefore rested on the strength of their statistical evidence—specifically, their multiple regression analysis.

A multiple regression analysis is a statistical technique designed to estimate the effects of several independent variables on a given result. Properly used, such an analysis can estimate how much influence variables such as race, experience, and education had on perceived disparities in salary level. The independent variables included in respondents' study were: (1) education; (2) years of work experience and (3) race. App., 106a, *infra*. In 1975 and 1978, the average salary of black special agents was about $3,000 below the average salary of white special agents. Plaintiffs asserted that their regression analysis showed that race was probably a significant cause of part of that disparity. *Ibid.*

Petitioners presented evidence that included expert testimony attacking "the methodological integrity and explanatory value of plaintiffs' statistics, alternative statistical analyses tending to show an absence of discrimination, testimonial evidence concerning DEA's equal employment opportunity programs, and cross-examination of plaintiffs' anecdotal accounts of individual discrimination" (App., 13a, *infra*).

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aptitude or intelligence test or an educational requirement, that would properly be subject to a disparate impact analysis. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Pouncy* v. *Prudential Ins. Co.*, 668 F.2d 795, 799-800 (5th Cir. 1982). Consequently, neither the district court nor the court of appeals applied a disparate impact analysis to respondents' claims, except to the extent discussed *infra*.

Most significantly, petitioners' expert witnesses testified that certain flaws in respondents' statistical analysis, including the omission of prior law enforcement or comparable experience as an independent variable, impaired the validity of that analysis and made it improper to conclude from it that race was a significant factor in the perceived salary disparity.[3] Prior law enforcement experience is a critical factor under civil service requirements in determining whether a special agent will be placed initially at a GS-7 level or a GS-9 level;[4] the differences in initial placement are a key factor in explaining the per-

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[3] They also pointed out that the respondents' multiple regression analysis had a very low R^2 value (10 Tr. 1853-1855, 1859). The R^2 value measures the difference in the dependent variable that is likely to be attributable to the independent variables: where the independent variables totally control the dependent variable, the R^2 value is one; where they are entirely unrelated, the value is zero. Finkelstein, *Regression Models in Administrative Proceedings*, 86 Harv. L. Rev. 1442, 1448-1449 (1973); *Vuyanich* v. *Republic Nat'l Bank*, 505 F. Supp. 224, 273 (N.D. Tex. 1980), vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984). The R^2 values here showed that all the independent variables in respondents' multiple regression analysis taken together explain only 21% to 37% of the variations in salary of special agents hired after the Act's effective date (App., 52a-53a n.27, 107a, 109a, *infra*). Similarly, these variables explained less than 20% of the difference in rate of hiring at different grade levels between blacks and whites (PX 7, Tables 8, 8a). See page 7, *infra*.

[4] While at least one year of criminal investigative or comparable experience is a basic prerequisite for service as a special agent, an applicant with two years of prior criminal investigative or comparable specialized experience would qualify for a GS-9 position upon entering DEA (App., 101a-102a, *infra*). Applicants with less than this length of such experience could not be assigned an entry level higher than GS-7 (*ibid.*).

ceived racial disparity. Petitioners' experts also presented an extensive series of studies, known as cohort analyses. App., 13a-14a, *infra*. In these analyses, the experts divided the workforce into groups of agents based on the year the agents joined DEA and the GS grade level they received upon entry. Average salaries were then compared within each such group. *Ibid.* The cohort analyses showed that the average salaries of black special agents were no lower than those of their white cohorts. *Ibid.*[5]

2. The district court ruled on the basis of the foregoing evidence that petitioners had violated Title VII with regard to salary disparities between black and white agents, grade at entry level, work assignments, supervisory evaluations, discipline, and promotions.[6]

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[5] Petitioners' evidence also showed that DEA's Administrator at the time of the trial, Peter Bensinger, had an impressive record on equal employment opportunity matters, including responsibility for appointment of numerous minority persons to high level posts in the State of Illinois before he assumed his position at DEA. As Administrator of DEA, Mr. Bensinger continued his commitment to equal employment opportunity policies, establishing advisory committees among DEA's black, Hispanic, female, and Asian American employees, as well as an overall EEO Advisory Committee that met with him quarterly. He estimated that he spent 10% to 15% of his time as Administrator on EEO matters. He made efforts to reduce the processing time for individual complaints and installed a monthly EEO tracking system. The court of appeals noted that "the record contains significant uncontradicted evidence of DEA's institutional good faith in implementing equal employment opportunity programs" (App., 78a, *infra*).

[6] The district court ruled that respondents had failed to prove discrimination in Schedule A appointments, training, and harassment and reprisal. App., 146a, *infra*.

The court rejected respondents' anecdotal testimony, ruling that "the allegations of specific discrimination by Black special agents [were] not corroborated by other evidence, and [were] substantially refuted by government witnesses. Defendants proved that the specific acts alleged did not occur because of the agent's race." App., 137a, *infra*.[7]

The court based its finding of discrimination on testimony regarding blacks' general "feelings and perceptions" of discrimination (App., 136a, *infra*), and respondents' statistical evidence. Essential to the court's determination of liability was its rejection of the petitioners' contention that respondents' multiple regression analysis was not probative because it failed to account for prior criminal investigative or comparable, specialized work experience. Recognizing that a regression analysis "may be deemed insignificant" if relevant factors are excluded from the analysis, the court nonetheless placed the burden on the defendants to "rework plaintiffs' statistics incorporating the omitted factors or present other proof undermining plaintiffs' claims" (App., 140a, *infra*). Thus,

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[7] With regard to the testimony of the three witnesses called by respondents who claimed discrimination in initial grade assignment, the district court found that one "did not have Civil Service status at the time he applied to DEA and thus could not be equated with" two white agents who were placed at a higher grade than he (App., 119a, *infra*); another did not present any evidence regarding the qualifications of individuals hired at a higher grade level than he (App., 120a, *infra*); and the third was inadvertently placed at a GS-7 level due to an administrative error, but the mistake was corrected and he was placed at a GS-9 level *one day* after his initial incorrect placement (App., 122a, *infra*). The court concluded that petitioners "successfully rebutted" respondents' anecdotal testimony regarding initial placement "at every turn" (App., 142a, *infra*).

the court rejected petitioners' criticisms of respondents' multiple regression analysis because the "criticisms were never empirically based" (App., 140a, *infra*). Instead, the court ruled that there was discrimination in initial placement of black and white special agents, relying upon findings that blacks were 16% less likely than whites to be placed initially in GS-9 positions, rather than GS-7 positions,[8] without regard to the proportions in which black and white applicants were hired, or whether those who were hired were equally likely to meet the specialized experience requirements for GS-9 positions.[9]

3. The court of appeals affirmed the district court's liability determination. The court's opinion establishes a "Framework for Analysis" (App., 18a, *infra*) providing that an employer automatically converts a disparate treatment case into a disparate impact case if it asserts, as a defense to a disparate treatment claim, a facially neutral employment practice (here, differentiation on the basis of prior job experience) as the reason for a perceived racial disparity (App., 18a-31a, *infra*). Acknowledging (App., 28a, *infra*) that this analysis conflicts with that of other circuits (citing *Pouncy* v. *Prudential Ins. Co.*, 668 F.2d 795, 800 (5th Cir. 1982) and *Rivera* v. *City*

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[8] App., 112a, *infra*.

[9] In a subsequent opinion and order, the district court ordered extensive relief against petitioners, including classwide backpay relief, promotional goals and timetables, and frontpay specifically linked to those goals and timetables. The court of appeals substantially overturned these orders and remanded for reconsideration (see note 13, *infra*). We accordingly do not seek review of any of the relief ordered.

of Wichita Falls, 665 F.2d 531, 539 (5th Cir. 1982)), the court nevertheless ruled that, "when an employer defends a disparate treatment challenge by claiming that a specific employment practice causes the observed disparity, and this defense sufficiently rebuts the plaintiffs' initial case of disparate treatment, the defendant should at this point face a burden of proving the business necessity of the practice" (App., 27a-28a, *infra*). Thus, under the court's analysis, an employer automatically establishes a prima facie case of discrimination against itself, and takes on the burden of showing business necessity, when the employer shows that a facially neutral employment practice explains a perceived racial disparity, regardless of whether plaintiff has alleged that the facially neutral employment practice violates Title VII, or of the state of the rest of the record.[10]

The court of appeals then sustained the district court's finding of intentional discrimination on the basis of inferences of discrimination drawn from the multiple regression analysis presented by respondents. Although the court recognized (App., 8a, *infra*) that "[t]he choice of proper explanatory variables determines the validity of the regression analysis," like the district court it credited a multiple regression analysis that omitted the qualification of prior specialized experience for initial placement at the GS-9 level. The court gave three reasons for accepting that statistical analysis (App., 39a-41a, *infra*): (1) it asserted that the civil service definition of "specialized ex-

[10] Judge Edwards filed a concurring opinion in which he stated (App., 97a, *infra*) that "[s]o long as the defendant has adequate notice of the need to prove business necessity, it is irrelevant that this duty is prompted by the defendant's, rather than the plaintiff's, proof."

perience" is highly subjective; (2) it placed the burden of production of evidence regarding specialized experience on petitioners because it concluded that they had better access to the relevant information, and (3) it found no evidence in the record suggesting that blacks were less likely than whites to possess the requisite specialized experience.

The court rejected petitioners' rebuttal evidence, which included expert testimony and extensive statistical evidence, stating (App., 26a, *infra*, footnote omitted) that "in the class action pattern or practice case, the strength of the evidence sufficient to meet [the] rebuttal burden will typically need to be much higher than the strength of the evidence sufficient to rebut an individual plaintiff's low-threshold *McDonnell Douglas* [*Corp.* v. *Green*, 411 U.S. 792 (1973)] showing".[11]

The court also ruled that it was not error for the district court to refuse to admit petitioners' alternative regression analysis showing that prior job experience, rather than race, explained the salary differentials at DEA.[12] This evidence was offered at

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[11] The court noted (App., 56a-57a, *infra*) that the district court erred in ruling that "[a]fter the establishment of a *prima facie* case * * * the burden of persuasion shifts to the employer," but excused that error on the ground that after this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), the district court responded to a motion for clarification by stating that it had allocated the burdens in conformity with *Burdine*.

[12] Although the court of appeals stated (App., 58a n.31, *infra*) that this regression analysis is not part of the record, it was filed as an affidavit attached to a memorandum of points and authorities concerning remedies on November 2, 1981; the district court simply chose to rely on plaintiffs' regression analysis and refused to reconsider its liability finding (Memo. Op. of Feb. 17, 1982, at 3).

the remedial stage of the proceeding, and relied upon in moving for reconsideration (Mar. 1, 1982). The court of appeals ruled that it was not an abuse of discretion for the district court to refuse to reopen the liability stage to consider it.[13] The court of appeals denied a petition for rehearing en banc with Judges Wilkey, Bork, and Scalia dissenting (App., 151a-152a, *infra*).[14]

REASONS FOR GRANTING THE PETITION

Complex, class-wide Title VII litigation requires courts to engage in careful analysis and evaluation of the evidence in accord with the substantive principles of law underlying the statute. In this case, which turns solely on statistical evidence,[15] the courts below departed from those principles in ways that not only caused them to reach the wrong result in this case, but also will have seriously harmful effects on the conduct of future Title VII litigation by the lower courts. Perhaps most significantly, the court of ap-

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[13] The court of appeals vacated the imposition of strict promotion goals and timetables in the district court's remedial order, as well as the class-wide frontpay tied to these goals and timetables, and remanded the case for further remedial proceedings by the district court. App., 81a-82a, *infra*. The court also affirmed the district court's use of a class-wide backpay scheme, but vacated the particular calculation of the backpay formula. *Ibid.* Four days after it issued its opinion, the court of appeals issued a supplemental order stating that "[i]n considering the issues of appropriate remedies on remand, the District Court should * * * consider the Supreme Court's opinion in [*Firefighters Local Union No. 1784* v.] *Stotts*, to the extent applicable" (App., 82a, 154a, *infra*).

[14] Judge Starr did not participate.

[15] Both courts below rejected respondents' anecdotal evidence (page 6, *supra*; App., 42a-45a, *infra*).

peals ignored the method of proof for disparate treatment cases prescribed in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and formulated a conflicting analytical framework that automatically converts a disparate treatment case into a disparate impact case whenever an employer articulates a defense that a perceived statistical disparity is caused by the plaintiffs' failure to account for a specific reasonable employment practice in their statistical proof.

The court of appeals' approach not only restricts the employer's defenses previously recognized by this Court; it also would make Title VII litigation that is already extremely complex even more complicated and difficult to resolve fairly. The courts would have to decide, in the midst of class-wide disparate treatment litigation, whether any number of employment practices had a disparate impact not justified by business necessity, even though plaintiffs had not pleaded or presented evidence tending to establish a disparate impact claim. The added burden imposed on the government as an employer would be particularly onerous; it could be required to undergo the enormously expensive and time consuming validation procedures for many employment qualification standards prescribed by the Office of Personnel Management (OPM), even if those standards were not attacked as having a discriminatory impact not justified by business necessity. Otherwise, the government would risk a ruling that, through its defense against a disparate treatment charge, it had made out a prima facie disparate impact claim against itself and had not validated the qualification. There are several hundred federal occupational series, and each series

has distinct qualification standards, normally containing different qualification requirements for each grade level. Thus, the rule enunciated by the court of appeals could seriously disrupt the federal personnel system. Moreover, the court of appeals' ruling undercuts one of the basic purposes of Title VII by eliminating the possibility of conciliation before suit; under the panel's approach, the employer need not be informed prior to suit what practices plaintiffs are challenging and why plaintiffs think those practices violate Title VII—even though those practices are entirely explicit and were well known to the plaintiffs. Thus, conciliation of the disparate impact claims inserted into the lawsuit by the court's unprecedented rule would be impossible.

The findings of the courts below that DEA had engaged in purposeful discrimination were based on statistical evidence lacking in probative value; that evidence failed to account for a key qualification—prescribed by a published, measurable civil service qualification standard—that controlled initial placement of individuals hired as DEA special agents. Given the absence of any other credible evidence of discrimination, the finding of liability under a disparate treatment theory was without support, and was contrary to principles of law established by this Court and by other courts of appeals.

1. The substantive principles of law underlying Title VII require that disparate treatment claims and disparate impact claims be analyzed differently. When class-wide claims of disparate treatment are in issue, "[p]roof of discriminatory motive is critical" (*International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977)). In contrast, the employer's motive is irrelevant in a dis-

parate impact case (*id.* at 336). Once plaintiffs have shown that an identified employment practice has a disparate impact, and thereby established a prima facie case, the employer will be held liable unless the practice can be justified by business necessity. *Dothard* v. *Rawlinson*, 433 U.S 321, 329 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). The rule of the court of appeals automatically converting a disparate treatment case into a disparate impact case, and placing the burden on the employer to prove the business necessity of a facially-neutral employment practice—without regard to either the pleadings or proof of the plaintiffs—seriously distorts well-established Title VII analysis.

The court of appeals' ruling conflicts with this Court's careful description of the method and order of proof to be followed in disparate treatment cases. In *Burdine*, this Court explained that the burden on the defendant is "to rebut the presumption of discrimination [raised by plaintiffs' prima facie case] by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason" (450 U.S. at 254). This Court then held that if the employer presents "a legitimate reason for the action" the burden shifts back to the plaintiff to show that proffered reason was not the true reason for the employment decision, but was a pretext for discrimination. 450 U.S. at 255-256; see also *McDonnell Douglas Corp.* v. *Green*, *supra*. This method of proof nowhere contemplates a requirement that the employer show the business necessity of the legitimate nondiscriminatory reason for the employment decision. The imposition of such an additional requirement on the employer thus unfairly limits the defenses available to the employer under this Court's decisions.

In determining whether a practice asserted by an employer as a defense to a disparate treatment charge is a legitimate, nondiscriminatory reason for the observed disparity, the court may properly evaluate the reasonableness of the practice. But the purpose of that inquiry is simply to determine whether the employer had, in fact, intentionally discriminated against plaintiff—*i.e.*, whether the asserted practice was legitimate, or merely a pretext for discrimination. Under the court of appeals' ruling, however, the evaluation of the asserted employment practice is not limited to this inquiry. Instead, it wrongly changes the focus of the inquiry from whether purposeful discrimination occurred to whether there is a business necessity for the practice. Without the foundation of a disparate impact case—in which plaintiffs identify, plead and present evidence that a particular employment practice has a disparate impact on a protected class—there is no legal basis for requiring the employer to prove the business necessity of a facially neutral practice.[16]

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[16] In the instant case, the court of appeals did not even consider whether there was evidence in the record establishing that any employment practice had a significant disparate impact. It merely assumed that if the employer raises an employment practice as an explanation for a perceived racial disparity, the employment practice must be taken to have a sufficiently disparate impact to constitute a prima facie case under a disparate impact theory. This assumption is highly questionable; in the instant case there is no evidence that the specialized experience requirement had a sufficiently severe impact on the initial placement of special agents to satisfy the requirements for a prima facie case under the disparate impact theory. Blacks were only 16% less likely than whites to be initially placed at a GS-9 rather than a GS-7 position, and for those hired after the effective date of Title VII, the

The court of appeals incorrectly suggests that *Burdine* does not apply to a class action, on the theory that plaintiffs' prima facie showing in a class action will always be stronger than that presented in an individual case, so that "[t]he bare articulation of a nondiscriminatory explanation, while sufficient to rebut an individual plaintiff's low-threshold *McDonnell Douglas* showing, generally will not suffice as a rebuttal to a typical class-wide showing of pervasive discrimination." App., 25a, *infra*. But the affirmative case can be either very strong or barely sufficient to carry the burden, in either an individual suit or a class action. Indeed, since the court of appeals held that the statistical evidence need not show gross disparities in order to establish a prima facie case, see App., 44a, *infra*, there is no reason to suppose that in a class suit the prima facie case based on statistical evidence will be more probative of discrimination than the prima facie case in an individual suit. Moreover, precisely the same statistical evidence can be used to establish a prima facie case in support of either an individual or a class claim. There is thus no justification for placing a greater burden on the employer to rebut a prima facie case in the latter situation.

Although other courts of appeals have asserted that the *Burdine* analysis applies only to individual

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difference was only 12%. App., 12a, *infra*. The federal employee selection guidelines provide that "[a] selection rate for any race * * * which is less than four-fifths * * * (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies *as evidence of* adverse impact, while a greater than four-fifths rate will generally not be [so] regarded" (29 C.F.R. 1607.4 D; 28 C.F.R. 50.14, Sec. 4D (emphasis added)).

disparate treatment cases,[17] the court below is alone in adopting a rule that drastically revises the *Burdine* analysis by utilizing the defendant's evidence to automatically convert a disparate treatment case into a disparate impact case. The court of appeals itself acknowledged that this ruling conflicts with the rule in other circuits (App., 28a, *infra*). See *Pouncy* v. *Prudential Ins. Co.*, *supra*; *Rivera* v. *City of Wichita Falls*, *supra*; *Pope* v. *City of Hickory*, 679 F.2d 20, 22 (4th Cir. 1982); *Mortensen* v. *Callaway*, 672 F.2d 822, 824 (10th Cir. 1982). These circuits recognize that "[t]he discriminatory impact model of proof in an employment discrimination case is not * * * the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." *Pouncy* v. *Prudential Ins. Co.*, 668 F.2d at 800. If the plaintiff wishes to use the disparate impact model, he must identify the particular practice he wishes to attack and present evidence showing that it has a disproportionate, ad-

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[17] *Craik* v. *Minnesota State University Board*, 731 F.2d 465, 468-471 (8th Cir. 1984); *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798, 818 (5th Cir.), cert. denied, 459 U.S. 1038 (1982). But see *Gerdom* v. *Continental Airlines, Inc.*, 692 F.2d 602, 608-609 (9th Cir.), cert. dismissed, 460 U.S. 1074 (1982); *Croker* v. *Boeing Co.*, 662 F.2d 975, 990-991 (3d Cir. 1981). *Craik* and *Payne* suggest that *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 360-362, establishes the relevant pattern of proof. But the description in *Teamsters* of the burden imposed on the employer after the plaintiffs establish a prima facie case of disparate treatment—to show that plaintiffs' proof is "inaccurate or insignificant * * * [or] to provide a nondiscriminatory explanation for the apparently discriminatory result" (431 U.S. at 360-361 & n.46) —does not differ significantly from *Burdine's* description of the employer's burden.

verse effect on him or the members of his class. See *Pope* v. *City of Hickory, supra*; *Mortensen* v. *Callaway, supra.*

The court of appeals' ruling is unfair to employers, and in particular to the federal government as an employer, because it requires employers to defend against charges that are not contained in the pleadings and of which the employer may not have adequate notice. Many class-wide disparate treatment cases are in litigation for years, with numerous claims of discrimination in all kinds of employment practices. Such suits are already immensely complex and enormously expensive to defend. In the course of his defense the employer may attempt to rebut plaintiffs' statistical evidence by showing that the disparity is caused by a nondiscriminatory employment practice. If he succeeds in doing so, the employer has successfully defended against the charge of intentional discrimination against him, unless the plaintiff shows that the employment practice is a pretext for discrimination. There is no legal basis for making the employer go further, and show the business necessity of practice that plaintiffs have not identified or challenged as violating Title VII. See *Pouncy* v. *Prudential Ins. Co.*, 668 F.2d at 800; *Pope* v. *City of Hickory*, 679 F.2d at 22; *Mortensen* v. *Callaway*, 672 F.2d at 824; *Rivera* v. *City of Wichita Falls, supra*; *Heagney* v. *University of Washington*, 642 F.2d 1157, 1163 (9th Cir. 1981).

Moreover, the practical difficulties that this rule would cause are enormous. The validation study ordered by the district court in this case and the task of designing new personnel practices for DEA will take at least six years and cost approximately

$400,000.[18] Because virtually all employment qualification determinations in the federal civil service, whether for initial placement, promotion, or entry into training programs, are based on minimum qualification standards published by OPM,[19] the implications of the court of appeals' ruling are apparent: the ruling could place at issue the validity of innumerable qualification standards, with the consequent staggering expense of validation of such standards, even in the absence of any challenge to those standards under a disparate impact theory.[20] Moreover, litigation against any individual agency would threaten the employment practices of the entire government, because the court's ruling could require a federal agency to show the business necessity of a standard prescribed government-wide by the OPM. When objective employment qualifications are published, and thus readily available to plaintiffs, and plaintiffs have not charged or proved that any such practices violate Title VII under a disparate impact theory, there is no justification for imposing such burdens on the government as an employer.

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[18] See Joint Stipulation of July 31, 1981; Stipulation of Apr. 25, 1983; Notice of Filing of Jan. 7, 1985; Supplemental Notice of Filing of Jan. 15, 1985.

[19] The standard involved here is Series GS-1811, Criminal Investigator, contained in the OPM's *Qualification Standards for Positions Under the General Schedules* (1968), known as Handbook X-118.

[20] The problem is exacerbated by the fact that the standards vary greatly in the extent to which they require the exercise of expertise in their application to individual employee or applicant qualifications. Standards that leave much discretion to expert personnel judgments are simply not susceptible to validation, in the same way that test scores, or height or weight limitations are, and in some instances may not be susceptible to validation at all.

The court of appeals' ruling also undercuts an important goal of Title VII by virtually eliminating the possibility for conciliation between plaintiffs and employers. A carefully constructed administrative process is prescribed by Title VII, and initiation of that process has been made a prerequisite to bringing suit, so that—to the extent possible—differences can be worked out informally between employer and employee without resort to litigation, for "conciliation, rather than litigation, is a recognized goal of Title VII." *Porter* v. *Adams*, 639 F.2d 273, 277 (5th Cir. 1981). See 42 U.S.C. 2000e-16. The court of appeals' theory, allowing conversion of a disparate treatment case to a disparate impact case in mid-trial, circumvents the administrative process and the possibility of conciliation of the specific employment practices between employee and employer prior to trial.[21] Moreover, the court's rule applies only to classwide cases, in which plaintiffs generally are represented by counsel, and usually ones well-versed in Title VII law. Thus, the requirement that counsel in such cases abide by the administrative exhaustion requirements will further the substantive purposes of Title VII and will not

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[21] Conciliation is likely to be an effective way to resolve disparate impact claims in federal employment, because the use of selection procedures with a disparate impact is inconsistent with federal employment policies. The federal government has published guidelines providing that "[t]he use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment * * * opportunities of members of any race * * * will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 [excusing validation when it is not "technically feasible"] * * * are satisfied." 28 C.F.R. 50.14, Sec. 3.

create a risk that individuals unlearned in the law will be deprived by a legal technicality of having their complaints heard. See *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

The court of appeals' ruling automatically converting a disparate treatment case into a disparate impact case in the midst of litigation, even if considered an alternative holding or dictum in this case, will have an immediate and crippling effect on orderly procedure and fair resolution of Title VII cases. Clearly, the court has prescribed a procedure to be used henceforth by lower courts in the conduct of Title VII cases—a procedure binding on district courts in the leading circuit for the litigation of complex Title VII class claims against the government.[22] See 1B *Moore's Federal Practice* ¶ 0.402[2] (2d ed. 1984). The enormous expense and difficulties for employers, and particularly the federal government, as well as the damage to the orderly conduct of Title VII litigation, that will be caused by the rule announced by the court of appeals argues strongly for review by this Court at this time.

2. In finding intentional discrimination in this case, the court of appeals has once again ignored fundamental principles governing the evaluation of evidence in Title VII litigation, as it did in *Aikens* v. *United States Postal Service*, 665 F.2d 1057 (D.C. Cir. 1981), vacated, 460 U.S. 711 (1983), and *Trout* v. *Lehman*, 702 F.2d 1094 (D.C. Cir. 1983), sum-

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[22] This ruling is another example of what has been perceived as a disturbing practice of this court of appeals of announcing important rulings as alternative holdings or dicta, thereby allegedly attempting to evade accountability. See Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 372.

marily rev'd, No. 83-706 (Feb. 27, 1984). The court recognized that "[t]he trial was in large measure a duel of experts armed with sophisticated statistical means of proof," App., 7a-8a, *infra*, but it failed to evaluate that statistical evidence in light of applicable legal principles, and to require that there be a logical basis for inferring discrimination from it. *Mayor of Philadelphia* v. *Educational Equity League*, 415 U.S. 605, 620-621 (1974). We recognize that, in an appropriate case, intentional discrimination can be inferred from statistical evidence alone, if that evidence reaches proper proportions and takes into account relevant factors. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 339-340. But the statistical evidence presented here simply did not meet that standard.

Relying on the uneven distribution of blacks and whites in certain grade levels, the court of appeals appears to have lost sight of the fact that the principal focus of Title VII is the protection of *individuals* from discrimination. See *Connecticut* v. *Teal*, 457 U.S. 440, 453 (1982); *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978); 110 Cong. Rec. 7213 (1964). Title VII "does not ultimately focus on ideal social distributions of persons of various races and both sexes. Instead it is concerned with combating culpable discrimination." *Contreras* v. *City of Los Angeles*, 656 F.2d 1267, 1275 n.5 (9th Cir. 1981).

Properly used, statistical models and analyses can help a court determine whether such culpable conduct occurred. However, to perform that function, statistical evidence must meet minimum standards of reliability. For example, properly constructed statistical analysis would have aided the court here in determining whether the difference in initial place-

ments resulted from discrimination or from legitimate, nonracial employment requirements. But to perform such a function, the statistical analysis had to account for the minimum measurable qualifications necessary for the higher initial placement. See *e.g.*, *De Medina* v. *Reinhardt*, 686 F.2d 997 (D.C. Cir. 1982); *Valentino* v. *United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982); *Eastland* v. *Tennessee Valley Authority*, 704 F.2d 613, 624-625 (11th Cir. 1983). Conversely, a plaintiff's regression analysis that does not include such qualifications as variables lacks probative value.

In the instant case, the salary disparity between blacks and whites results from a larger proportion of whites than blacks beginning at a GS-9 rather than a GS-7 grade level. Respondents' regression analysis included as independent variables nothing more than race, educational level, and the number of years of work experience. It wholly failed to differentiate between types of experience. But the published standards of OPM distinguished between the qualifications for placement at GS-7 and GS-9 levels with sufficient specificity to permit measurement. At least one year of criminal investigative or comparable experience was a basic requirement for placement as a DEA special agent at either GS-7 or GS-9 level. An applicant with *two* years of prior criminal investigative or comparable experience qualified for a GS-9 position, while those with less time spent in such specialized experience could not be assigned an entry grade level higher than GS-7.[23] Because it failed to account for this second year of specialized

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[23] The standard contained a number of examples of the types of experience that qualify as comparable. See pages 25-26, *infra*. Respondents presented no evidence that the standard was applied in a discriminatory way. See note 26, *infra*.

experience as a minimum objective qualification for placement at the higher grade level, respondents' statistical analysis lacked probative value.[24] It simply did not compare people with comparable qualifications.

The recent decision of the Court of Appeals for the Fourth Circuit in *Bazemore* v. *Friday*, No. 82-1873 (Dec. 10, 1984), petition for rehearing and suggestion for rehearing en banc pending, provides a significantly different approach in evaluating multiple regression analysis than that applied by the court of appeals in the instant case.[25] The *Bazemore* court found (slip op. 30) that a multiple regression analysis that failed to include nine independent variables lacked probative value where plaintiffs alleged that certain salary disparities were the result of racial discrimination:

> The purpose of multiple regression is to account for changes in a single variable through the examination of other variables which might be expected to influence that variable. In the present

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[24] The lack of probative value of respondents' regression analysis is confirmed by its very low R^2 value: *all* of the independent variables included in that analysis explained no more than 20% of the differences in initial placement between agents. See note 3, *supra*.

[25] The government has filed a petition for rehearing with suggestion of rehearing en banc in *Bazemore*, arguing that the court of appeals erred in failing to find that the continuing effects of pre-Act discrimination in compensation violate Title VII, in failing to find that a performance rating system violated Title VII under a disparate impact theory, and in failing to find that some blacks were entitled to relief even under the approach employed by the court of appeals panel. Private plaintiffs have also filed a rehearing petition and have raised, inter alia, the issue of who has the burden of including the asserted independent variables in a regression analysis.

> instance, that single variable is salary. An appropriate regression analysis of salary should therefore include all measurable variables thought to have an effect on salary level. * * * However, both experts omitted from their respective analysis variables which ought to be reasonably viewed as determinants of salary. As a result, the regression analyses presented here must be considered unacceptable as evidence of discrimination.

What independent variables are reasonably required to be included within a multiple regression analysis before that analysis can be said to have significant probative value will depend on the facts of each case. In *Bazemore*, prior experience was one of the nine independent variables that the court believed should have been, but was not, included in the multiple regression analysis submitted in that case. The United States argued in *Bazemore* that the prior experience requirement need not be included in the multiple regression analysis because, inter alia, the hiring agency did not have *any* standards for determining the particular kinds of prior experience that warrant an increased starting salary. *Bazemore* was concerned not with prior experience standards for placement at different levels, but with salary differences among people performing at the same job level. In contrast, the court of appeals in the instant case credited a regression analysis that failed to include explicit prior experience qualifications that distinguish betwen persons eligible for placement at a GS-9 level and those who could be placed no higher than a GS-7 level. The prior experience requirements in this case are sufficiently described by the OPM Handbook X-118 to be measurable and, thus, do not suffer from the vagaries that characterize the prior

experience requirements at issue in *Bazemore*. We believe that the *Bazemore* court went too far in requiring that the multiple regression analysis in that case include prior experience as an independent variable; our position is not that the plaintiffs' multiple regression analysis must include any qualification that the employer at some point in the litigation asserts as necessary for the position at issue. Rather, a rule of reasonableness must apply. In the instant case, the prior experience requirement for placement as GS-9 was published by the government, thoroughly explained in Handbook X-118, and a factor that any reasonable analysis should have considered in determining why a disproportionate number of whites were initially placed at the higher job level in DEA. The failure of a regression analysis to include such a factor destroys its significance.

The court of appeals gave three reasons for crediting respondents' regression analysis despite its failure to account for this minimum experience requirement. None is substantial. First, the court of appeals' objection that the experience requirement provided in the relevant standard was too subjective to be included within a regression analysis is without foundation. The OPM Handbook X-118 specifically describes the type of experience that would satisfy the specialized experience requirement for initial placement of special agents—criminal investigative—and gives a number of examples of acceptable experience: investigative experience as a member of a military intelligence or criminal investigative component of any of the branches of the Armed Services or in any of the various intelligence or investigative branches of the public service, investigation of complex casualty or insurance claims, investigation of criminal cases for practicing attorneys, and experi-

ence as a uniformed law officer where the principal duties are criminal investigations. Handbook X-118 also specifies various types of experience related to investigative work, but that would *not* qualify for the experience requirement: experience in performing the normal duties of policemen, guards, watchmen or private detectives assigned principally to the protection of life or property, experience as a probation or parole officer not involving pre-sentence investigations or the like, investigations of minor insurance damage claims, clerical work incidental to the adjudication of claims, and experience as a payroll clerk, cashier, or inspector whose primary duty was to examine plants and materials. Clearly, the standards set forth in the Handbook refute any suggestion that the specialized experience requirement is not sufficiently objective to be included within a multiple regression analysis.[26]

The court's second reason for excusing respondents' failure to include the experience requirement, *i.e.*, that petitioners had better access to the necessary information, is also erroneous. All the necessary information was contained in personnel folders that were equally available to respondents. Respondents chose to use only the information contained in De-

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[26] There is absolutely no suggestion that the "comparable experience" standard was applied in a discriminatory way. The evidence of the way the standard had been applied to the class members and their white cohorts was available to respondents in the personnel folders, and they could have challenged any discriminatory application of that standard in their anecdotal evidence. Since they presumably presented their most persuasive anecdotal evidence, the fact that both courts below concluded that it showed no discriminatory treatment strongly suggests that the standard was applied in a nondiscriminatory manner.

partment of Justice computerized personnel records, called JUNIPER tapes. These tapes are not used in the hiring or promotion process and do not record data critical to grade assignment under the X-118 standards. Respondents' failure to go beyond the information contained in the JUNIPER tapes and include the information necessary to determine whether an applicant was qualified for initial placement at the GS-9 level caused their regression analysis to be fatally deficient.

The court finally asserted that "even if we accept *arguendo* that a second year of specialized experience—or, for that matter, of criminal investigative experience—is a minimum objective qualification, DEA's objection would still fall far short * * * [because a]part from the unsubstantiated declamations of DEA's appellate attorneys, nothing in the record so much as hints that black special agents are less likely than white special agents to possess this qualification" (App., 40a-41a, *infra*). But the question at issue was solely whether respondents' regression analysis sufficiently reflected the actual requirements for the jobs at issue to constitute reliable evidence. Thus, in requiring petitioners to present evidence concerning the impact of the specialized experience requirement on blacks, the court again placed an improper burden on defendants. It is incumbent on plaintiffs to produce statistics that reflect the minimum objective qualifications for the positions at issue. See *Davis* v. *Califano*, 613 F.2d 957, 964 (D.C. Cir. 1979); *Valentino* v. *United States Postal Service*, 674 F.2d 56, 70 (D.C. Cir. 1982); *Eastland* v. *Tennessee Valley Authority*, 704 F.2d 613, 623-625 (11th Cir. 1983). Because of its repudiation of that principle, the decision below warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL, ET AL., PETITIONERS

v.

HENRY W. SEGAR, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 82-1541, 82-1590

HENRY W. SEGAR, ET AL.

v.

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL, ET AL., APPELLANTS

HENRY W. SEGAR, ET AL., CROSS-APPELLANTS

v.

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL, ET AL.

Argued Sept. 8, 1983

Decided June 22, 1984

As Amended June 26, 1984

Appeal and Cross-Appeal from the
United States District Court
for the District of Columbia

(D.C. Civil Action No. 77-00081)

Before WRIGHT, WALD, and EDWARDS, Circuit Judges.

Opinion for the court filed by Circuit Judge J. SKELLY WRIGHT.

Concurring opinion filed by Circuit Judge HARRY T. EDWARDS.

J. SKELLY WRIGHT, Circuit Judge:

Title VII of the Civil Rights Act of 1964 [1] proclaims one of this nation's most fundamental, if yet unrealized, principles: a person shall not be denied full equality of employment opportunity on account of race, color, religion, sex, or national origin. Title VII bars both intentional discrimination and artificial, arbitrary, or unnecessary barriers to equal opportunity.[2] In this case we review a decision of the United States District Court for the District of Columbia, *Segar v. Civiletti*, 508 F. Supp. 690 (D.D.C. 1981), holding that the federal Drug Enforcement Agency (DEA) had engaged in a pattern or practice of discrimination against its black agents in violation of Title VII. A class comprising black agents

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[1] 42 U.S.C. § 2000e *et seq.* (1976 & Supp. V 1981).

[2] Section 703(a) of the Civil Rights Act provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). That section applies fully to the federal government, *id.* § 2000e-16.

initiated this suit in 1977 and the case came to trial in 1979. Finding that DEA had discriminated against black agents in salary, promotions, initial (GS) grade assignments, work assignments, supervisory evaluations, and imposition of discipline, 508 F.Supp. at 711-715, the District Court ordered a comprehensive remedial scheme consisting of a class-wide backpay award, promotion goals and timetables to ensure that qualified black agents received promotions to the upper levels of DEA, and a class-wide frontpay award to compensate such qualified agents while they awaited the promotions they deserved. In the course of the proceedings the court also denied plaintiffs' request for pre-judgment interest and issued a preliminary injunction barring transfer or demotion of Carl Jackson (the Jackson injunction), a black agent who was the subject of adverse employment decisions immediately after his testimony for plaintiffs in this lawsuit.

On appeal DEA challenges the liability determination, the remedial scheme, and the Jackson injunction. Plaintiffs cross-appeal the denial of prejudgment interest. As to the liability determination, DEA urges that the trial court erred in finding that plaintiffs had presented sufficient probative evidence to support any inference of discrimination at DEA, and urges that DEA had in any event effectively rebutted plaintiffs' showing. As to the remedial scheme, DEA argues that class-wide relief was inappropriate and that imposition of promotion goals and timetables both exceeded the court's remedial authority under Title VII and violated the equal protection component of the Fifth Amendment Due Process Clause. DEA also argues that Carl Jackson did not make a showing of retaliation sufficient to justify the preliminary injunction.

To resolve this appeal we have had to plumb some of the deepest complexities of Title VII adjudication. After careful review, we affirm the District Court's liability determination in its entirety. We also affirm the trial

court's decision to use a class-wide backpay remedy, but we vacate the backpay formula imposed and remand for reformulation of the particular backpay award. We also vacate the part of the District Court's remedy that mandates promotion goals and timetables. We do not hold that such remedies exceed a court's remedial authority under Title VII. Nor do we hold that such remedies violate the Constitution. Nonetheless, we find that the District Court's particular order of goals and timetables was not appropriate on the current factual record. Because the frontpay remedy was specifically linked to the promotion goals and timetables, we vacate that part of the remedial order as well, and remand to the District Court for further consideration of appropriate remedies.[3] We affirm the preliminary injunction against demotion or transfer of Carl Jackson and we expect the District Court to undertake resolution of the status of the Jackson injunction on remand. We affirm the trial court's denial of prejudgment interest.

I. Background

DEA, an agency formed in 1973 within the Justice Department, enforces this nation's federal criminal laws concerning the illegal sale, distribution, and use of drugs. Establishing DEA, the federal government sought to consolidate drug enforcement efforts that had theretofore been spread among several agencies. "Special agents" carry on the bulk of DEA's criminal investigative work. DEA employs about 2,000 such agents, and as of 1978 seven percent were black. Special agents perform surveillance of suspected drug dealers, transact "buys" of drugs as evidence for prosecutions, do related undercover work, develop cases for prosecution by United States

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[3] We vacate the frontpay remedy only because the trial court specifically linked it to the promotion timetables, and without prejudice to reinstatement of a new frontpay remedy if the trial court finds such a course appropriate on remand.

Attorneys, and, depending on their rank, supervise other special agents. Findings of Fact (Findings) ¶¶ 1-2, 508 F.Supp. at 693-695.

The District Court made extensive findings of fact concerning DEA's employment practices. *See* Findings ¶¶ 1-51, 508 F.Supp. at 692-711. Though we need not rehash the factual context of this case in its entirety, we will review the facts particularly pertinent to the issues on appeal.

A. *DEA's Personnel Requirements*

Hiring. The Civil Service Commission Handbook establishes the minimum entry level requirements for special agents. Depending on qualifications, special agents will enter at either GS-7 or GS-9. The requirements for entry at GS-7 are three years of general experience and one year of specialized experience. The requirements for GS-9 are three years of general experience and two years of specialized experience.[4] In addition, special agents are defined as criminal investigators, and this classification requires that one year of their prior specialized experience be in law enforcement or comparable work.[5]

Work Assignments. Special agents carry out the variety of assignments described above. Race influences the location of an agent's assignment. All other things being equal, DEA will assign black agents to areas where a large percentage of the suspected violators are black. Race also influences the type of work agents receive. Black agents tend to perform a disproportionately large amount of undercover work. DEA generally infiltrates

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[4] The parties have stipulated as to the Civil Service definitions of general experience and specialized experience. *See* Joint Exhibit I (the relevant portions of which are presented at Joint Appendix (JA) 39-43). These definitions are discussed in detail *infra*. *See* Part II-B-1-a *infra*.

[5] *See* Joint Exhibit I, JA 40.

drug networks from the bottom up, and operates on the assumption that black agents will be more readily able to infiltrate organizations consisting primarily of blacks. The nature of an agent's work assignments will have an important bearing on the agents' prospects for promotion. Though some undercover work is desirable, a surfeit of such work injures an agent's promotion opportunities because the agent is unable to obtain the breadth of experience needed for promotions. Findings ¶ 23, 508 F.Supp. at 705.

Promotions. At DEA promotions from GS-7 to GS-9, from GS-9 to GS-11, and from GS-11 to GS-12 are noncompetitive. A special agent receives a promotion upon completion of one year of service in grade, recommendation by the agent's group supervisor, concurrence by a second level supervisor, and approval by a DEA regional director.

Promotions from GS-12 up through GS-18, the highest GS level at DEA, are competitive agency-wide. To receive such a promotion an agent must satisfy the minimum in-grade requirement, be placed on the "best qualified" list by the appropriate rating and ranking board, and be selected by the appropriate selecting official. In making determinations the rating and ranking boards rely primarily on the agent's most recent performance appraisal, information on disciplinary action within the last two years, and the agent's application and profile sheet. Those agents chosen for the best qualified list are then ranked numerically on a series of performance factors.[6]

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[6] When the numerical system was first implemented in 1976, point values were as follows: length of experience (20); breadth of experience (40); education and training (10). In 1978 DEA modified the rating system as follows: breadth of experience (45); performance evaluations (45); training (10). Within the breadth of experience and performance evaluation categories are several subcategories. Under breadth of experience are: supervisory experience (8); complex investigation experience (6); internal security

Rating and ranking boards have not been provided with any particular guidance for assigning numerical values to various aspects of an agent's performance. Findings ¶ 4, 508 F.Supp. at 695.

B. *This Lawsuit*

In January 1977 two black special agents of DEA, and an association representing all black special agents, brought suit alleging that DEA had engaged in a pattern or practice of racial discrimination against black special agents in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16 (1976 & Supp. V 1981). These agents alleged discrimination in recruitment, hiring, initial grade assignments, salary, work assignments, evaluations, discipline, and promotions. *See Complaint*, Joint Appendix (JA) 22.

On September 9, 1977 the trial court, pursuant to Federal Rule of Civil Procedure 23(b)(2), certified the class of all blacks who then served or had had been discharged as special agents at DEA, and who had applied for positions or would in the future apply. *Order of Class Certification*, September 9, 1977 JA 37. Before trial the parties settled the claims involving discriminatory recruitment and hiring, but could not come to terms on the other issues. *See Stipulation of Settlement of Plaintiffs' Claims of Discrimination in Recruiting and Hiring of Special Agents*, JA 44. As is common in Title VII class actions, the District Court bifurcated the trial into separate liability and remedial phases. After lengthy discovery, the liability issues came to trial in April 1979.

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experience (7); diverse domestic (6) and foreign (7) experience; and special skills (4). Under performance evaluation are: most recent annual rating (25); supervisor's comments (15); and awards (5). Findings ¶ 4, 508 F.Supp. at 695.

The trial was in large measure a duel of experts armed with sophisticated statistical means of proof.

1. *The plaintiffs' case.* The plaintiffs presented a range of statistical and anecdotal evidence of discrimination. The statistical evidence included several multiple linear regression analyses as well as a number of studies considering the effects of particular employment practices.

Multiple regression is a form of statistical analysis used increasingly in Title VII actions that measures the discrete influence independent variables have on a dependent variable such as salary levels. *See Valentino v. U.S. Postal Service*, 674 F.2d 56, 70 (D.C.Cir. 1982). Typically the independent variables in Title VII cases will be race, age, education level, and experience levels. The first step in a multiple regression analysis is specification of the independent (or explanatory) variables thought likely to affect significantly the dependent variable. The choice of proper explanatory variables determines the validity of the regression analysis. A coherent theory, devised prior to observation of the particular data, must be employed to select the relevant explanatory variables. *See Vuyanich v. Republic Nat'l Bank of Dallas (Vuyanich I)*, 505 F.Supp. 224, 269 (N.D.Tex. 1980), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984). When the proper variables have been selected, the multiple regression analysis is conducted, generally by a computer. In essence, the regression measures the impact of each potential explanatory variable upon the dependent variable by holding all other explanatory variables constant. The analysis yields figures demonstrating how much of an observed disparity in salaries can be traced to race, as opposed to any of the other potential explanatory variables.

The computer analysis will generally also yield two other measurements that assist in evaluation of the explanatory power of the regression. The first is "T-Ratio." The T-Ratio measures the probability that the result ob-

tained could have occurred by chance.[7] The second is R^2. The R^2 figure measures, to a certain extent, the degree to which a multiple regression analysis taken as a whole explains observed disparities in a dependent variable.

Having observed an average disparity in salary of about $3,000 between white and black special agents at DEA, plaintiffs' experts, Professors Bergmann and Straszheim,[8] formulated a regression analysis to discover whether and to what extent race explained the observed salary disparity. The experts based their analysis on a "human capital model." A widely accepted approach, the model builds on labor economists' findings that the human capital an employee brings to a job—such as education and experience—in large measures determines the employee's success. *See* Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387, 480 n. 90 (1975); *Vuyanich I*, *supra*, 505 F.Supp. at 265-267.

Plaintiffs' experts selected education, prior federal experience, prior nonfederal experience, and race as the four independent variables that might explain the salary differential. Information regarding these independent variables came from the computerized JUNIPER personnel information tapes of the Department of Justice. Findings ¶ 7a-b, 508 F.Supp. at 696. Professors Bergmann and Straszheim then ran the regressions. They first evaluated the causes of salary disparities among all agents as of five dates: the first of January in 1975, 1976, 1977, and 1978 and the first of October in 1978. This study generated the following results:

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[7] The T-Ratio figure for a particular measure of race-related disparity corresponds to the number of standard deviations for that figure. D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 297 n. 14 (1980).

[8] Professors Bergmann and Straszheim both hold Ph.D.'s and teach labor economics at the University of Maryland. Findings ¶ 6, 508 F.Supp. at 695.

DATE	RACE COEFFICIENT	T-RATIO
1/1/75	−$1,628	4.65
1/1/76	−$1,744	5.37
1/1/77	−$1,119	5.15
1/1/78	−$1,934	5.15
10/1/78	−$1,877	4.50

Findings ¶ 7b, 505 F.Supp. at 696.

The race coefficient measures the salary disparities between white and black agents when education and prior experience are held constant. The T-Ratio figures here correspond to standard deviations of four or five. *See* D. BALDUS &. J. COLE, STATISTICAL PROOF OF DISCRIMINATION 297 n. 14 (1980) (hereinafter "D. Baldus & J. Cole"). Since a standard deviation level higher than three indicates that the odds are less than one in a thousand that an observed result could have occurred by chance, these figures indicate that the odds are far less than one in a thousand that the observed disparities for any year could have occurred by chance. A study is generally considered to be statistically significant when the odds that the result occurred by chance are at best one in 20. *See* D. Baldus & J. Cole, *supra*, at 297.

Professors Bergmann and Straszheim then ran a second regression to measure salary disparities over the same time frame for agents hired after 1972. They intended this study to generate some measure of the effects of race discrimination at DEA after 1972. Title VII applies to DEA in this action only as of that date.[9] Because the

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[9] Plaintiffs are subject to the statutory limit on the period of actionable discrimination; under Title VII liability may not accrue for a period of more than two years before the date of filing of an administrative complaint with the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5(g). In this case the actionable period began on July 15, 1972. *See Memorandum Opinion*, February 17, 1982, at 3 n.2, JA 114, 116 n. 2. Although not formally created until 1973, DEA was at its creation a consolidation of other federal agencies en-

first regression measured disparities in the salaries of all black agents, including those hired before 1972, the race coefficient in that study may have reflected disparities resulting from the continuing effects of discrimination that occurred prior to 1972, rather than actionable post-1972 discrimination. This second regression generated the following results:

DATE	RACE COEFFICIENT	T-RATIO
1/1/75	−$ 378	.84
1/1/76	−$1,864	2.54
1/1/77	−$1,119	3.18
1/1/78	−$ 866	2.07
10/1/78	−$1,026	2.30

Findings ¶ 7d, 508 F.Supp. at 696.

Again a significant salary disparity between agents with comparable education and experience was revealed. The T-Ratios indicate that for every year, save 1975, the possibility that the result could have occurred by chance was at most one in 20. Though these figures are not as high a level of significance as were those of the first regression, they still meet the generally accepted test for statistical significance. The second regression, moreover, tends to understate the amount of post-1972 discrimination at DEA. Because the post-1972 study measures discrimination among newer agents, the study focuses on the speed with which the new recruits make their way through the lower levels of DEA. Promotions at these levels are relatively automatic, and discrimination thus has less opportunity to work its effects. Discrimination will most adversely affect older agents contending for upper level positions; promotion decisions at these levels incorporate far more discretionary elements and leave more room for bias. *See* Part I-A *supra*. The study does not measure any post-1972 discrimination against those hired before 1972. Since these agents would have been

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gaged in drug enforcement efforts, and agents serving these agencies became DEA agents.

the ones contending for the upper level positions during the time frame studied, they would have been the ones on whom discrimination would have been most likely to operate. The problem is particularly severe with respect to the 1975 race coefficient. Almost half of those studied to obtain this figure were hired in 1974. Findings ¶ 7c, 508 F.Supp. at 696. Since they were in their first year at the time of the study, they would not yet have been eligible for a grade promotion.

Having uncovered evidence of significant discrimination in salary levels, plaintiffs' experts undertook a more exacting inquiry into DEA's employment practices to pinpoint where discrimination was taking place. They first examined DEA's initial grade assignment practices. Through regression analyses they determined at a sufficient level of statistical significance that blacks were 16 percent less likely than comparably qualified whites to have been hired at GS-9 rather than GS-7. For those hired after 1972, blacks were 12 percent less likely to be hired at GS-9. Findings ¶ 9, 508 F.Supp. at 698-699. The experts then evaluated work assignments, supervisory evaluations, and discipline. In all three categories statistical analysis revealed significant levels of discrimination against black agents. Findings ¶¶ 12, 14, 15, 508 F.Supp. at 698-700. Finally, plaintiffs' experts studied promotions at DEA. Promotions up to the GS-11 level were found to be relatively automatic. The promotion rate from GS-11 to GS-12 was 70 percent for blacks and 82 percent for whites. This differential met generally accepted levels of statistical significance. Differentials in promotion rates for positions above GS-12 were also found, but—largely because of the small sample size—these differentials did not achieve statistical significance at generally accepted levels. Findings ¶ 16, 508 F.Supp. at 701-702.

To buttress the statistical proof plaintiffs introduced anecdotal testimony of discrimination. This evidence consisted of accounts by several black agents of perceived

discrimination against them in initial grade assignments, work assignments, supervisory evaluations, and discipline. These agents also testified about their general perceptions of racial hostility at DEA.

2. *Defendant DEA's case.* DEA responded to plaintiffs' case in several ways. The rebuttal consisted of expert testimony attacking the methodological integrity and explanatory value of plaintiffs' statistics, alternative statistical analyses tending to show an absence of discrimination, testimonial evidence concerning DEA's equal employment opportunity programs, and cross-examination of plaintiffs' anecdotal accounts of individual discrimination.

DEA's first expert was Dr. J. Wanzer Drane, an associate professor of statistics at Southern Methodist University. In his testimony he attacked the methodology of plaintiffs' statistical analyses. He asserted that plaintiffs had failed in their analysis to account for the relevant explanatory variable of prior law enforcement experience, and that the explanatory power of plaintiffs' salary studies (the R^2 and the T-Ratio) was too low. He also presented a more generalized critique of the suitability of the regression methodology for measurement of discrimination in the present situation. Findings ¶ 7f-n, 508 F.Supp. at 696-697; *see* Trial Transcript (Tr.) 1850-1871; brief for appellants at 36-38.

To supplement this critique DEA offered an alternative statistical analysis that tended to show an absence of discrimination. This study—prepared by Dr. B.C. Spradlin, a consultant—was not a regression but an alternative statistical methodology known as cohort analysis. Under this approach all employees who start together at the same level are surveyed over the course of an observation period and their comparative progress in salary and promotion is evaluated. Evaluating promotion and salary disparities among DEA agents who started at the same year and grade level, Dr. Spradlin's cohort analysis suggested significant discrimination in four of 15 groups.

These four groups were broken into subgroups. Discrimination was found in two of the subgroups. DEA then examined the personnel files of those in the subgroups showing discrimination and found that three individuals had been misclassified. When these three were properly classified, the study showed no significant discrimination. Findings ¶ 8, 508 F.Supp. at 697-698; *see* Tr. at 1909-1913.

Testimonial evidence buttressed DEA's statistical rebuttal. DEA presented extensive general testimony on its efforts to establish equal opportunity programs and implement equal opportunity goals at the agency. Through cross-examination of plaintiffs' witnesses, DEA also sought to rebut every particular anecdotal account of discrimination.

C. *The District Court Decision*

1. *The liability determination.* Judge Robinson held that DEA had discriminated against black special agents in violation of Title VII across a range of employment practices. The court found that the salary differentials between white and black agents were a result of race discrimination, and that DEA had discriminated against black agents in grade-at-entry, work assignments, supervisory evaluations, and promotions. 508 F.Supp. at 712-715. The finding of discrimination in promotions extended to promotions above the GS-12 level, even though the court did not credit plaintiffs' statistical evidence of discrimination at that level because the statistics had not achieved acceptable levels of statistical significance. The court based its finding of discrimination at the upper levels on inferences from proven discrimination at the immediately preceding levels and discrimination in the factors that bear most directly on promotions (work assignments, evaluations, and discipline). 508 F.Supp. at 714-715.

To make these determinations the District Court credited the bulk of plaintiffs' statistical evidence[10] and rejected both DEA's critique of this evidence and DEA's alternative statistics. In particular, the court rejected DEA's claims that plaintiffs' statistics did not possess sufficient explanatory power, that the failure to account for prior law enforcement experience skewed the studies, and the DEA's cohort analysis rebutted plaintiffs' showing of discrimination. As to the alleged failure to account for law enforcement experience, the court held that DEA's objection was "speculative and incapable of rebutting plaintiffs' statistical showing." *Id.* at 712. Moreover, the court found that the "cohort analysis was irreparably flawed," primarily because the methodology focused on groups too small to generate statistically significant evidence of discrimination. *Id.* at 698, 712. Since DEA had hinged its defense on this effort to rebut plaintiffs' showing of race-related disparities, the District Court's findings were dispositive against DEA.

2. *The Remedies Determination.* Having found pervasive discrimination at DEA, the District Court—in a separate remedial proceeding—set out to formulate an appropriate remedial plan.[11] The essential elements of the plan were class-wide backpay, promotion goals and timetables, and class-wide frontpay. *See Memorandum Opinion* (Mem.Op.) and *Order* (Remedial Order), February 17, 1982, JA 114.

Class-wide Backpay. Rather than order individualized relief hearings, *see Int'l Brhd of Teamsters v. United*

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[10] The court did, however, refuse to credit most of plaintiffs' anecdotal accounts of specific instances of discrimination. Findings ¶ 51d, 508 F.Supp. at 710.

[11] DEA sought at the remedial hearing to introduce its own regression analyses. These regressions purportedly showed an absence of race-related disparity at DEA. The District Court rejected this proffered evidence of DEA's nonliability as untimely. *See Memorandum Opinion, supra* note 9, at 3, JA 116.

States, 431 U.S. 324, 361-362, 97 S.Ct. 1843, 1867-1868, 52 L.Ed.2d 396 (1977), the District Court ordered a class-wide award of backpay for members of the plaintiff class. For successive one-year periods beginning in July 1972, a class-wide backpay pool figure would be calculated. The calculations would derive from plaintiffs' first salary regression study (which measured disparities among all agents including those hired before 1972). For every year for which figures were available—1975 to 1979—the class-wide pool figure would be the race coefficient multiplied by the number of black special agents. For the years before 1975 and after 1979 the race coefficient would be derived by extrapolating backward and forward from the available figures, and this extrapolated coefficient would be multiplied by the number of black agents.

The annual backpay pool would be distributed evenly among eligible black agents. Only agents above the GS-9 level during the year in question were made eligible. The court excluded agents at GS-7 and GS-9 because most discrimination was found to occur at the higher levels of DEA. The court did, however, permit individual plaintiffs to come forward and seek backpay for discrimination suffered in initial grade assignment (viz. assignment to GS-7 instead of GS-9). Any such individual awards would be subtracted from the class-wide pool in order to prevent double liability. Mem.Op. at 3, JA 116.

Promotion Goals and Timetables. Finding discrimination at the upper levels of DEA, the District Court ordered remedial promotion goals and timetables. Since black agents made up at least 10 percent of agents at every level through GS-12 the court held that a 10 percent goal was appropriate for all levels above GS-12. Mem.Op. at 4, JA 117. To meet this goal the court ordered DEA to promote one black agent for every two white agents until 10 percent black representation had been met at GS-13 and above (or until five years had passed). *Id.*

Class-wide Frontpay. To compensate black agents awaiting promotion under the goals and timetables plan the court established a class-wide frontpay formula. Frontpay pool calculations were also based on extrapolations from the salary regression, but the pool was to be adjusted to reflect progress DEA had made under the promotions goals and timetables. Remedial Order at 9-12, JA 126-129. The pool was to be distributed to all black agents at GS-12 for at least two years and all black agents above GS-12.

3. *Other issues.* In the course of the proceedings two other issues arose. Plaintiffs sought and were refused an award of prejudgment interest on the backpay awards. *See* Mem.Op. at 3 n.4, JA 116 n.4. Also, during the time between the liability and remedial determinations the court issued a preliminary injunction barring demotion or transfer of black special agent Carl Jackson. *See Memorandum Opinion and Order of May 5, 1981*, JA 101. Shortly after Jackson had testified at trial in this case he became the target of harassment and eventually of adverse employment actions including demotion and transfer. The District Court concluded that there was a high likelihood that these actions were in retaliation for Jackson's testimony, and therefore preliminarily enjoined Jackson's demotion or transfer.

D. *The Appeal.*

DEA appeals several aspects of both the liability and the remedial determinations, and also challenges the Jackson injunction. Plaintiffs cross-appeal from the denial of prejudgment interest. We will consider separately DEA's challenges to the liability decision, the remedial decision, and the Jackson injunction. We will then consider plaintiffs' claim for prejudgment interest.

II. The Liability Determination

A. *Framework for Analysis*

A plaintiff in a Title VII action can prove liability under two theories: disparate treatment or disparate impact. In a disparate treatment claim a plaintiff seeks to prove that an employer intentionally "treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Teamsters, supra,* 431 U.S. at 335 n.15, 97 S.Ct. at 1854 n.15. Proof of illicit motive is essential, but, especially in cases alleging class-wide discrimination, illicit motive may be inferred from a sufficient showing of disparity between members of the plaintiff class and comparably qualified members of the majority group. *Id.* Such class-wide allegations of discrimination are commonly referred to as "pattern or practice" cases. In *Teamsters, supra,* the Supreme Court noted that "the question whether the company engaged in a pattern or practice of discriminatory [action] * * * involves controlling legal principles that are relatively clear," *id.* at 334-335, 97 S.Ct. at 1854, and went on to characterize the case as one of disparate treatment. A claim that the sum of an employer's practices results in less favorable treatment of members of the plaintiff class than of comparably qualified whites or males may justify an inference that "discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.* at 336, 97 S.Ct. at 1855. This is because a disparity in treatment of the comparably qualified is "the expected result of a regularly followed discriminatory policy." *Id.* at 361 n.46, 97 S.Ct. at 1867 n.46.

In a disparate impact claim a plaintiff challenges "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* at 336 n.15, 97 S.Ct. at

1855 n.15. To prevail on a disparite impact theory a plaintiff need not prove illicit motive; "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed. 2d 158 (1971) (emphasis in original). This disparate impact concept may be relevant in two ways to a case involving allegations of class-wide discrimination. First, in addition to bringing a pattern or practice disparate treatment claim, plaintiffs may well challenge the disparate impact of specific employment practices and thus force the employer to prove the job-relatedness of those practices. *See Griggs, supra*, 401 U.S. at 432, 91 S.Ct. at 854. Second, plaintiffs' pattern or practice disparate treatment challenge to the employment system as a whole may also implicate disparate impact analysis. A pattern or practice disparate treatment case shares with a typical disparate impact suit the allegation that an employer's practices have had a systemic adverse effect on members of the plaintiff class. *See Teamsters, supra*, 431 U.S. at 336 n.15, 97 S.Ct. at 1855 n.15 ("Either theory may, of course, be applied to a particular set of facts."); *Vuyanich v. Republic Nat'l Bank of Dallas* (*Vuyanich II*), 521 F.Supp. 656, 663 (N.D. Tex. 1981), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984). Though a plaintiff class will initially seek to show a disparity among the comparably qualified in order to prove disparate treatment, an employer may seek to defend by pointing to a specific, arguably nondiscriminatory, employment practice as the cause of the observed disparity. In such situations the defendant may appropriately be required to demonstrate the business necessity of the practices causing the disparity because the court will have before it all the elements of a traditional disparate impact claim. *See* Part II-A-2 *infra*.

Proceeding under the disparate treatment theory, plaintiffs in this case allege a pattern or practice of illegal discrimination at DEA. Proceeding under the dis-

parate impact theory, plaintiffs also challenge a number of DEA's specific employment practices—initial grade assignments, work assignments, supervisory evaluations, discipline, and promotions decisions. Thus plaintiffs challenge both the entirety of DEA's employment system and several specific components of that system. To establish a framework for analysis of these allegations, we will first examine the sequence and allocation of proof in a class action alleging a pattern or practice of disparate treatment and alleging disparate impact with respect to specific employment practices. We will then locate within that framework the approach that the parties have taken in joining the liability issue in this case.

1. *Sequence and allocation of proof.* Functionally the disparate treatment and disparate impact models have different aims, and the proof sequences associated with each reflect these differences. Disparate treatment aims at discovery and elimination of intentional discrimination. On the disparate treatment claim the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). Since the plaintiff class will likely try to meet this ultimate burden by proving a disparity sufficient to permit an inference of discrimination, plaintiff must carry the burden of persuasion as to the existence of the disparity. Disparate impact aims at discovery and elimination of facially neutral employment practices that adversely affect minorities and cannot be justified as necessary to an employer's business. On the disparate impact claim plaintiffs bear the burden of persuasion as to the existence of a race-related disparity caused by an employment practice, but, once plaintiffs have made this showing, the employer bears the burden of persuasion as to the business necessity of the practice. *See Vuyanich II, supra,* 521 F.Supp. at 660.

Though allocations of proof differ in this crucial way, an important point of convergence exists in class actions like the present case. Both pattern or practice disparate treatment claims and disparate impact claims are attacks on the systemic results of employment practices. The pattern or practice claim amounts to an allegation that an observed disparity is the systemic result of an employer's intentionally discriminatory practices. The disparate impact claim amounts to an allegation that an observed disparity is the systemic result of a specific employment practice that cannot be justified as necessary to the employer's business. Consequently the proof of each claim will involve a showing of disparity between the minority and majority groups in an employer's workforce. These two factors—the difference in ultimate burden of proof and the similarity in proof of disparity—must inform our understanding of the intermediate burdens that the parties to such an action face.[12]

A plaintiff class seeking to show a pattern or practice of disparate treatment must "carry the initial burden of offering evidence adequate to create an inference that" employment decisions were "based on a discriminatory

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[12] Typically, Title VII litigation proceeds through a more or less well-defined sequence of shifting intermediate burdens of proof. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-254, 101 S.Ct. 1089, 1093-1094, 67 L.Ed.2d 207 (1981) (defining sequence for non-class action disparate treatment claim); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975) (defining sequence for disparate impact claim). Though these proof sequences are designed to sharpen the inquiry into alleged illegal discrimination, they can confuse more than clarify when they are applied inflexibly. *See Int'l Brhd of Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 3[illegible] (1977). Nowhere is this more true than in pattern or practice cases such as the one now before this court. These cases do not fit comfortably into the standard proof sequences. *See* note 14 *infra*.

criterion illegal under the Act." *Teamsters, supra,* 431 U.S. at 358, 97 S.Ct. at 1866. This usually means providing evidence—often in statistical form—of a disparity in the position of members of the plaintiff class and *comparably qualified* whites. Similarly, on the disparate impact challenges to specific employment practices the plaintiff class must present evidence that the practices have a disproportionately adverse effect on the plaintiffs. How far this prima facie showing will carry the plaintiff toward its ultimate burden of persuasion depends on both the strength of the plaintiffs' evidence and the nature of the defendant's response.

A defendant must tailor its response to the nature of the plaintiff's proof. *Teamsters, supra,* 431 U.S. at 360 n.46, 97 S.Ct. at 1867 n.46. In general, though, the response will follow two paths. The employer can endeavor to refute the plaintiffs' claim that a disparity exists. Alternatively, the employer can offer an explanatory defense; such a defense amounts to a claim that an observed disparity has not resulted from illegal discrimination. The nature of these defenses, and the burdens associated with them, differ in important ways.

a. *Challenges to the plaintiffs' proof.* Challenging the accuracy or significance of plaintiffs' proof, a defendant seeks to show that the alleged disparity on which plaintiffs' case is bottomed does not exist. Such a defense can of course be raised against both a disparate treatment and a disparate impact claim. Typically the challenge will focus on the integrity of the plaintiffs' statistical methodology and the significance of the results shown. Often the defendant will supplement the critique with alternative statistical analyses tending to refute the plaintiffs' evidence of disparity. The defendant need not carry the burden of persuasion as to the nonexistence of a disparity; on the disparate treatment claim "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," *Burdine, supra,* 450 U.S.

at 253, 101 S.Ct. at 1093, and on the disparate impact claims the plaintiffs must persuade the trier of fact that a disparity exists.

The defendant's rebuttal must, however, at least raise a genuine issue of material fact concerning the accuracy of the picture painted by the plaintiffs' statistics. And introduction of evidence sufficient to raise a genuine issue of material fact does not necessarily vindicate the defendant. *Burdine, supra,* 450 U.S. at 254-255, 101 S.Ct. at 1094. Rather, the strength of the evidence the defendant must produce to prevent the plaintiff from carrying the burden of persuasion as to disparity depends, as in any case, on the strength of the plaintiffs' proof. "[T]he defendant's evidence must do more than merely raise an issue of fact. * * * It must cast sufficient doubt on the plaintiff's proof to cause the trier of fact to conclude that the plaintiff has not proved discrimination by a preponderance of the evidence." *Vuyanich II, supra,* 521 F. Supp. at 663.

b. *The explanatory defense.* Alternatively, a defendant can attempt to show that any observed disparities between plaintiffs and the majority group did not result from discrimination violative of Title VII. The requirements of such a rebuttal will vary according to the type of claim the defendant seeks to rebut. To rebut a disparate impact challenge to a specific employment practice causing a disparity the employer must prove the business necessity of the practice. *See Albemarle Paper Co., supra,* 422 U.S. at 425, 95 S.Ct. at 2375. To rebut a disparate treatment challenge the employer can argue that the observed disparity between the plaintiff class and the majority group does not support an inference of intentional discrimination because there is a legitimate, nondiscriminatory explanation for the disparity. For example, the defendant might come forward with some additional job qualification—not sufficiently perceptible to plaintiffs to have permitted them to account for it in

their initial proof—that the plaintiff class lacks, thus explaining the disparity.

The nature of the burden that the defendant bears on such a defense is not entirely free of doubt. The defendant must at least make a "clear and reasonably specific showing," based on admissible evidence, that the alleged nondiscriminatory explanation in fact explains the disparity. *Burdine, supra*, 450 U.S. at 253-255, 101 S.Ct. at 1093-1095. In the context of an individual plaintiff's claim of disparate treatment, the Court in *Burdine* suggested that a defendant need do no more than make such an articulation. *Id.* at 253-254, 101 S.Ct. at 1093-1095. Though the principles on which *Burdine* is based are fully applicable to pattern or practice cases, the specific definition of the rebuttal burden on an employer in an individual plaintiff's disparate treatment case should not be unthinkingly applied to class actions such as the present case.

In an individual case a defendant's nondiscriminatory explanation serves only to undermine the inference of discriminatory intent arising from plaintiff's proof. Since plaintiff bears the burden of persuasion on the issue of intentional discrimination, the defendant should not have to persuade the trier of fact that plaintiff was treated less well for a nondiscriminatory reason. The defendant is required only to present evidence sufficient to permit the trier of fact legitimately to decline to infer discrimination from the plaintiff's proof. In the context of an individual's suit, the bare articulation of a legitimate nondiscriminatory explanation generally suffices to undermine a plaintiff's initial proof in this way because the plaintiff's prima facie case will typically consist of the low-threshold showing of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[13]

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[13] To make out a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-802, 93 S.Ct. 1817, 1823-

When a defendant in a pattern or practice class action offers such an explanation, the circumstances differ in two crucial ways. First, to make an initial showing of disparate treatment in such cases the plaintiff class will typically have presented statistical evidence showing pervasive disparities and eliminating most, if not all, potential nondiscriminatory explanations for the observed disparities. *See Vuyanich II, supra,* 521 F.Supp. at 663; Part II-A-1 *supra.*[14] Though the employer is not required to meet a burden of persuasion in rebutting the disparate treatment claim, the nondiscriminatory explanation must cast sufficient doubt on the plaintiffs' proof to permit the trier of fact legitimately to decline to draw an inference of discrimination from that proof. The bare articulation of a nondiscriminatory explanation, while sufficient to rebut an individual plaintiff's low-threshold *McDonnell-Douglas* showing, generally will not suffice as a rebuttal to a typical class-wide showing of pervasive discrimination. *Burdine* made this much clear:

> In saying that the presumption [of discrimination] drops from the case, we do not imply that the trier

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1824, 36 L.Ed.2d 668 (1973), an individual plaintiff need only show that he or she: (1) is a member of a protected group; (2) applied for the position and was qualified; (3) was rejected; and (4) the job remained open. 411 U.S. at 802, 93 S.Ct. at 1824. Presentation of a clear and reasonably specific explanation of the apparent disparity in treatment, if supported by admissible evidence, generally suffices to rebut the plaintiff's minimal initial showing. In such cases the burden appropriately shifts back to plaintiff to show that the employer's nondiscriminatory explanation is pretextual. *Burdine, supra* note 12, 450 U.S. at 253-254, 101 S.Ct. at 1093-1094.

[14] This proof will seek to show a disparity between the plaintiff class and the majority group, demonstrate that race explains the disparity by eliminating other possible explanations, and make these showings at high levels of statistical significance.

> of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. *Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.*

450 U.S. at 255 n.10, 101 S.Ct. at 1095 n. 10 (emphasis added). The typical pattern or practice case is closely analogous to the situation the Court envisions in the last sentence of the quoted passage: the plaintiffs' initial offer of evidence will have been so strong that the bare articulation of a nondiscriminatory explanation will not suffice to rebut it. Thus in both individual and class action contexts the defendant faces the same rebuttal burden; it must present sufficient evidence to permit the trier of fact to decline to draw the inference of discrimination from the plaintiffs' proof. But in the class action pattern or practice case the strength of the evidence sufficient to meet this rebuttal burden will typically need to be much higher than the strength of the evidence sufficient to rebut an individual plaintiff's low-threshold *McDonnell Douglas* showing.[15]

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[15] Such class actions often can be viewed as collapsing the prima facie and pretext stages of a suit involving an individual plaintiff. *See McKenzie v. Sawyer*, 684 F.2d 62, 71 (D.C. Cir. 1982); *Vuyanich v. Republic Nat'l Bank of Dallas*, 521 F.Supp. 656, 662 (N.D. Tex. 1981), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984). We do not mean to suggest, however, that plaintiff must rely on its initial proof. The plaintiff is of course free to—and if the defendant's rebuttal is sufficiently strong may have to—introduce evidence to discredit the rebuttal.

Second, the employer's effort to rebut the pattern or practice claim by articulating a legitimate nondiscriminatory explanation may have the effect of putting before the court all the elements of a traditional disparate impact case. By its explanation of an observed disparity the employer will typically pinpoint an employment practice (or practices) having a disparate impact on a protected class. And to rebut plaintiffs' case the employer will typically be required to introduce evidence showing that the employment practice in fact caused the observed disparity. *See Burdine, supra*, 450 U.S. at 258, 101 S.Ct. at 1096 ("defendant will normally attempt to prove the factual basis for its explanation"). In this situation, between the plaintiffs' prima facie showing of disparity and the defendant's rebuttal explanation of the disparity, the essential elements of a disparate impact case will have been placed before the trier of fact. Such a case is ripe for resolution using disparate impact analysis.[16] Though the plaintiffs in a disparate treatment case bear the burden of persuasion as to the existence of a disparity, the defendant bears the burden of proving the business necessity of the practices causing the disparity.[17] *Albemarle Paper Co., supra*, 422 U.S. at 425, 95 S.Ct. at 2375. Thus when an employer defends a disparate treatment challenge by claiming that a specific employment

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[16] Not every nondiscriminatory explanation will implicate disparate impact analysis. For example, an employer might seek to show that an observed disparity resulted from discrimination prior to the date Title VII applied to the employer. But when the employer's explanation amounts to an articulation of a specific employment practice, disparate impact analysis should apply.

[17] *Burdine* in no way altered this traditional allocation of burdens. The Court stated that it "recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." 450 U.S. at 252 n. 5, 101 S.Ct. at 1093 n. 5.

practice causes the observed disparity, and this defense sufficiently rebuts the plaintiffs' initial case of disparate treatment, the defendant should at this point face a burden of proving the business necessity of the practice. *Accord Vuyanich II*, *supra*, 521 F.Supp. at 662-663; *see* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV.L.REV. 945, 1004-1006 (1982).

The only difference between this situation and the traditional disparate impact case is that in the latter the plaintiff articulates the employment practice causing the adverse impact and forces the employer to defend it, while in the former the employer articulates the employment practice and must then go on to defend it. *Accord Vuyanich II*, *supra*, 521 F.Supp. at 663. Some case law from other circuits has expressed a reluctance to apply disparate impact analysis in this situation. Two concerns fuel this reluctance: (1) the perceived unfairness of placing on the defendant the dual burden of articulating which of its employment practices caused the adverse impact at issue and proving the business necessity of the practice, *see, e.g.*, *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 800 (5th Cir. 1982) (plaintiff required to point to specific employment practice causing adverse impact "in order to allocate fairly the parties' respective burdens of proof at trial"); and (2) the risk that an employer will be forced to justify the entire range of its employment practices when a plaintiff shows only that a disparity exists, *see Rivera v. City of Wichita Falls*, 665 F.2d 531, 539 (5th Cir. 1982). These concerns are, however, unpersuasive and difficult to harmonize with the purposes of Title VII.

As a practical matter, this issue arises in a context that renders such concerns largely irrelevant. An employer will face the justificatory burden only after a plaintiff class has shown a disparity in the positions of members of the class and the majority group who appear to be comparably qualified; if plaintiffs fail to make their prima facie case, the employer never faces this justifica-

tory burden. But if the plaintiffs have made their prima facie case, the employer, to avoid liability under the disparate treatment theory, will have to advance some nondiscriminatory explanation for the disparity. An employer's claim that it cannot isolate the cause of the disparity will be unlikely to deflect the force of the inference of discrimination from plaintiffs' proof. The defendant will in all likelihood point to a specific job qualification or performance/evaluation rating as the explanation for the observed disparity. Thus application of disparate impact in this situation will not, the fears of the *Pouncy* court notwithstanding, place on the employer any additional burden of articulation; to rebut the disparate treatment claim the employer will have had to articulate which employment practices cause an observed disparity. Nor will the employer be forced to justify all of its employment practices. The employer will be required to show the job relatedness of only the practice or practices identified as the cause of the disparity.

The concerns of *Pouncy* and *Rivera* are no more compelling on the theoretical level. The employer will possess knowledge far superior to that of the plaintiff as to precisely how its employment practices affect employees. This fact, as the Fifth Circuit noted in *Pouncy*, 668 F.2d at 801, traditionally justifies placing on the defendant the burden of proving the business necessity of an employment practice. So too it justifies the lesser burden of requiring the employer to articulate which of its employment practices adversely affect minorities.[18] A rule

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[18] The Supreme Court has recognized that retroactive relief for victims of Title VII violations serves the important purpose of removing barriers to equal opportunity because such relief "provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate the last vestiges" of discriminatory barriers. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-418, 95 S.Ct. 2362, 2371-2372, 45 L.Ed.2d

placing this justificatory burden on the employer advances the purposes of Title VII far better than would the contrary result. "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs, supra*, 401 U.S. at 430-431, 91 S.Ct. at 853; *accord Connecticut v. Teal*, 457 U.S. 440, 451, 102 S.Ct. 2525, 2533, 73 L.Ed.2d 130 (1982) ("Title VII strives to achieve equality of opportunity by rooting out 'artificial, arbitrary, and unnecessary' employer-created barriers to professional development"); *Teamsters, supra*, 431 U.S. at 364, 97 S.Ct. at 1869 ("a primary objective of Title VII is prophylactics to achieve equal employment opportunity and to remove barriers that have operated to favor white male employees over other employees"); *Albemarle Paper Co., supra*, 422 U.S. at 417, 95 S.Ct. at 2371. This purpose is not well served by a requirement that the plaintiff in every case pinpoint at the outset the employment practices that cause an observed disparity between those who appear to be comparably qualified. Such a requirement in effect permits challenges only to readily perceptible barriers; it allows subtle barriers to continue to work their discriminatory effects, and thereby thwarts the crucial national purpose that Congress sought to effectuate in Title VII. "It is abundantly clear that Title VII tolerates no

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280 (1975); *accord Teamsters, supra* note 12, 431 U.S. at 364, 97 S.Ct. at 1869. Similarly, plaintiffs' prima facie disparate treatment case spurs an employer's self-evaluation to determine which of its employment practices cause the observed disparity. Once these employment practices with differential impact have been brought into the open, no sound policy reason exists for refusing to apply traditional disparate impact analysis to them. Indeed, application of disparate impact in this situation speeds the day when we will have rid ourselves of discrimination in its subtle as well as its crass aspect.

discrimination, subtle or otherwise." *McDonnell Douglas Corp., supra,* 411 U.S. at 801, 93 S.Ct. at 1824. Thus when unnecessary employer-created barriers have been brought into the open through adjudication of a pattern or practice disparate treatment claim, these barriers should be evaluated under the disparate impact theory, as Congress intended them to be.[19]

2. *Locating this controversy within the analytical framework.* Plaintiffs, utilizing disparate treatment analysis, challenge the entirety of DEA's employment system, and, utilizing disparate impact analysis, challenge several particular employment practices in that system (DEA's procedures for initial grade assignments, discipline, supervisory evaluations, and promotion). In their disparate impact claims plaintiffs seek to show that these specific practices have an adverse effect on black agents, and thereby to force DEA to prove the business necessity of the challenged practices. In their disparate treatment claim plaintiffs seek to show that they are treated less well than comparably qualified white agents. Evidence of overall salary disparities, buttressed by evidence of the specific places in DEA's employment system where discrimination occurs, supports this challenge. Whether this overall challenge will also raise disparate impact issues beyond those already raised by plaintiffs' challenges to several specific DEA employment practices depends on the nature of DEA's defense. *See* Part II-A-1-b *supra.*

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[19] We note further that application of disparate impact analysis when appropriate in a pattern or practice case will not result in disparate treatment analysis swallowing up the whole of disparate impact analysis. Disparate impact will apply in the pattern or practice case only after plaintiffs have made a sufficient initial showing of disparity between groups that appear to be comparably qualified, and after it has been decided that the employer's explanation rebuts the disparate treatment claim.

DEA has channelled the bulk of its efforts into an attempt to show that plaintiffs' proof of disparity is either inaccurate or insignificant. DEA has bifurcated this attack into separate claims that plaintiffs' statistical proof is deficient and that DEA's proof in any event refuted plaintiffs' attempt to show race-related disparities. Though made separately, both arguments go to the question whether plaintiffs have met their burden of persuasion as to the existence of race-related disparities.

Subsumed in DEA's rebuttal are several specific legal issues. DEA claims that plaintiffs' initial case is deficient as a matter of law for two reasons. First, the regression analyses on which plaintiffs' case is bottomed do not account for all "minimum objective qualifications" for the special agent positions at issue. *See Davis v. Califano*, 613 F.2d 957, 964 (D.C. Cir. 1979). Second, because plaintiffs failed to produce any creditable anecdotal evidence of specific instances of discrimination, their statistical proof was required to, and failed to, meet the enhanced evidentiary threshold of showing "gross disparities" in treatment. *See Hazelwood School District v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736. 2741-2742, 53 L.Ed.2d 768 (1977). Even if plaintiffs' proof is not insufficient as a matter of law for these reasons, DEA claims, that proof would have been found unable to stand up to DEA's evidence had the trial court properly evaluated that evidence. One purported error DEA cites is the trial court's misstep in placing on DEA a burden of persuasion of nondiscrimination, instead of the proper burden of coming forward with credible rebuttal evidence. *See Burdine, supra*, 450 U.S. at 248, 101 S.Ct. at 1089. Another claim of error involves the trial court's purported abuse of discretion in failing to admit into evidence the alternative regression analyses that DEA offered at the remedial phase of the proceeding. DEA also claims that the trial court gave insufficient weight to its cohort analysis.

Preferring to rely on a direct attack on the evidence showing race-related disparities, DEA has offered little in the way of explanation for the observed disparities. Thus DEA's defense to both the disparate treatment and disparate impact allegations in large measure stands or falls with its arguments as to the nonexistence of the disparities that plaintiffs have sought to show. One aspect of DEA's challenge to plaintiffs' proof does, however, amount to an effort to provide a legitimate nondiscriminatory explanation for the observed disparity. DEA argues that plaintiffs' statistical analysis will not support an inference of discrimination because the observed disparity was caused by a lack in the plaintiff class of a particular job qualification. Though DEA makes this argument in the context of an attack on the legal sufficiency of plaintiffs' prima facie disparate treatment case, the claim can also be styled as a possible nondiscriminatory explanation for the disparity, and will be analyzed as such. To the extent the claim implicates a disparate impact analysis, *see* Part II-A-1-b *supra*, that analysis will also be undertaken.

B. *Analysis of the Liability Issues*

For the sake of clarity and congruence with the form of argument presented to us, we will separate our analysis along the lines suggested by the parties' arguments. First we will examine the sufficiency of plaintiffs' offer of proof in light of DEA's attack on the methodology and results of plaintiffs' statistical analyses. Then we will examine the strength of DEA's evidence, and consider DEA's allegations of error. Both lines of inquiry must, however, lead us toward resolution of the ultimate issue: In weighing all the evidence, did the trial court correctly conclude that plaintiffs carried their burden of persuasion as to the existence of illegal discrimination at DEA.[20]

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[20] The Supreme Court has recently stated: "Where the defendant has done everything that would be required of him

Also, to the extent DEA's rebuttal raises issues as to the business necessity of its employment practices, we will resolve these issues in accordance with *Griggs* and its progeny.

1. *The sufficiency of plaintiffs' initial case.* A "general principle" of disparate treatment adjudication requires the plaintiff to "carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Teamsters, supra,* 431 U.S. at 358, 97 S.Ct. at 1866. Because "[t]he facts necessarily will vary in Title VII cases," *McDonnell Douglas Corp. supra,* 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13, a specific test for the sufficiency of a plaintiff's initial proof is not possible. *Teamsters, supra,* 431 U.S. at 358, 97 S.Ct. at 1866. Rather, a plaintiff's initial proof must be measured against the more generalized functional standard that the Supreme Court has elaborated in *Teamsters, supra,* 431 U.S. at 358, 97 S.Ct. at 1866; *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978), and *Burdine, supra,* 450 U.S. at 253-254, 101 S.Ct. at 1093-1094. These cases hold that a sufficient prima facie case is made out when the plaintiff shows a disparity in the relative position or treatment of the minority group and has eliminated "the most common nondiscriminatory reasons" for the observed disparity. *Burdine, supra,* 450 U.S. at 253-254, 101 S.Ct. at 1093-1094; *accord Furnco, supra,* 438 U.S. at 579-580, 98 S.Ct. at 2951 (A prima facie case "is simply proof of actions taken by the employer from which we infer discriminatory animus be-

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if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs [to make the ultimate determination] * * *." *U.S. Postal Service Bd. of Gov. v. Aikens,* 460 U.S. 711, ——, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). We follow the prescribed analysis in this case.

cause experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations").

The present case typifies class actions alleging a pattern or practice of discrimination in that the plaintiffs' argument is largely bottomed on statistical evidence comparing the percentage and distribution of minorities in the employer's workforce to the percentage of minorities in the labor pool from which the employer is able to draw. To be legally sufficient these statistics must show a disparity of treatment, eliminate the most common nondiscriminatory explanations of the disparity, and thus permit the inference that, absent other explanation, the disparity more likely than not resulted from illegal discrimination. *Teamsters, supra*, 431 U.S. at 368, 97 S.Ct. at 1871.

A pattern or practice case challenges a host of employment decisions over time; in effect, it challenges an employment system. The most common nondiscriminatory explanation for a systemic disparity in treatment is a lack of qualifications among the minority group members. A plaintiff's statistical evidence must therefore focus on eliminating this nondiscriminatory explanation by showing disparities in treatment between individuals with comparable qualifications for the positions at issue. *Hazelwood School District, supra*, 433 U.S. at 308 n. 13, 97 S.Ct. at 2742 n. 13; *DeMedina v. Reinhardt*, 686 F.2d 997, 1007 (D.C.Cir. 1982) (*quoting* D. Baldus & J. Cole, *supra*, at 120).

Once the plaintiffs' analysis has focused on the proper groups for comparison, it must yield results that meet generally accepted standards of statistical significance. In other words, both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination.

a. *Methodology: minimum objective qualifications.* To ensure that a plaintiff's methodology has eliminated the common nondiscriminatory explanation of a lack of quali-

fications, this circuit has developed a requirement that statistical evidence of disparities account for the *minimum objective qualifications* for the positions at issue. *DeMedina, supra,* 686 F.2d at 1003; *Valentino, supra,* 674 F.2d at 71; *Davis v. Califano, supra,* 613 F.2d at 964. This requirement greatly aids evaluation of regression analyses such as those used here. Regressions seek to prove race discrimination by testing possible alternative explanations for an observed disparity between blacks and whites, and typically these alternative explanations will be particular employee traits such as prior experience or education. The minimum objective qualification approach should not, however, be read as a hard and fast rule; tests for the sufficiency of a Title VII prima facie case must not be applied in a "rigid, mechanistic, or ritualistic" way. *Furnco, supra,* 438 U.S. at 577, 98 S.Ct. at 2949. The minimum objective qualification approach is not a quick litmus test, but an analytic method to ensure that a plaintiff's statistics measure disparities among comparably qualified workers, rather than disparities in qualifications. The ultimate test of sufficiency must remain that of *Burdine, Teamsters,* and *Furnco:* did the plaintiffs offer evidence "adequate to create an inference that * * * employment decision[s] * * [were] based on a discriminatory criterion illegal under the Act." *Teamsters, supra,* 431 U.S. at 358, 97 S.Ct. at 1866. *Accord Burdine, supra,* 450 U.S. at 253-254, 101 S.Ct. at 1093-1094; *Furnco, supra,* 438 U.S. at 577, 98 S.Ct. at 2949; *Valentino, supra,* 674 F.2d at 74 (statement of Wald, J. on denial of rehearing) ("In each case, the critical question is whether there is a reasonable basis for inferring disparate treatment.").

In the present case DEA has challenged plaintiffs' salary regression analyses on the ground that they fail to account for a minimum objective qualification: specialized prior experience in criminal investigations. The burden of DEA's argument is that the failure to include this factor skewed all of plaintiffs' studies because the lower

salaries and less rapid promotions of black agents can in large measure be traced to the fact that black agents lack prior criminal investigative experience and therefore enter DEA at a lower grade level. This court must determine whether the failure of plaintiffs' analyses to account specifically for this factor precludes an inference of discrimination under the functional test of *Burdine*, *Teamsters*, and *Furnco*. Although we review the trial court's findings of fact on the clearly erroneous standard, *Albemarle Paper Co.*, *supra*, 422 U.S. at 424, 95 S.Ct. at 2374, the issue whether a Title VII plaintiff has included necessary variables in statistical proof "trigger[s] a more careful examination * * *." *Trout v. Lehman*, 702 F.2d 1094, 1101 (D.C.Cir. 1983), *vacated on other grounds*, —— U.S. ——, 104 S.Ct. 1404, 79 L.Ed.2d 732 (1984). We must therefore delve somewhat deeply into DEA's initial grade assignment practices.

Special agents enter DEA at either the GS-7 or the GS-9 level. The requirements for the two entry levels are set forth in the Civil Service Commission Handbook, x-118, and have been summarized in a stipulation of the parties, Joint Exhibit I, JA 39. The requirements for GS-7 are three years of general experience and one year of specialized experience. JA 39. The requirements for GS-9 are three years of general experience and two years of specialized experience. *Id.* General experience is defined as:

> [P]rogressively responsible experience which has required (1) ability to work or deal effectively with individuals or groups of persons; (2) skill in collecting and assembling pertinent facts; (3) ability to prepare clear and concise reports; and (4) ability and willingness to accept responsibility.

Id. Specialized experience is defined as:

> [P]rogressively responsible investigative experience which demonstrates (1) initiative ingenuity, resourcefulness, and judgment required to collect, as-

> semble and develop facts and other pertinent data; (2) ability to think logically and objectively, to analyze and evaluate facts, evidence, and related information, and arrive at sound conclusions; (3) skill in written and oral reports and presentation of investigative findings in a clear and concise manner; and (4) tact, discretion, and capacity for obtaining the cooperation and confidence of others

Id. at 40. In addition, special agents at both GS-7 and GS-9 are criminal investigators, JA 41, and one year of their prior specialized experience must be in criminal investigative work or other comparable work. JA 40.

Extrapolating, we see, *first*, that every special agent hired, whether at GS-7 or GS-9, must have at least one year of prior specialized experience in criminal investigative work, and, *second*, that the only difference between those hired at GS-7 and those hired at GS-9 is one additional year of specialized experience as defined above. According to the stipulation, this additional year need not be in criminal investigations.

These facts severely undermine DEA's argument. The claim that plaintiffs' statistics have wholly failed to account for prior experience in criminal investigations is inaccurate. Plaintiffs studied only those whom DEA had already hired. Every one of them must have met the basic Civil Service requirement of one year of prior criminal investigative experience to have been hired even at the GS-7 level. Thus DEA's claim that plaintiffs' studies "took no account of basic experiential requirements," brief for appellants at 60, is incorrect according to the facts to which DEA stipulated. Plaintiffs' studies did not specifically account for criminal investigative experience over and above this one year that all special agents possess. But—again according to the stipulated facts—criminal investigative experience above the one year minimum is not a requirement for entry at GS-9 instead of GS-7. Rather, the additional requirement for entry at GS-9 is a second year of "specialized experience" as defined in the Civil

Service Commission Handbook. Plaintiffs' failure explicitly to account for additional years of prior criminal investigative experience therefore cannot be viewed as an omission of a minimum objective qualification.

The only possible omission of a minimum objective qualification in this case would be plaintiffs' failure to account specifically for the requirement of an additional year of "specialized experience," as defined in the Civil Service Commission Handbook. For three reasons, we hold that the District Court's approval of plaintiffs' decision to exclude this variable from their analyses was not erroneous.

First, the operative Civil Service definition of "specialized experience" is highly subjective. It measures such intangibles as "ingenuity," "resourcefulness," "ability to arrive at sound conclusions," "tact," and "discretion." JA 40. The law is clear that a plaintiff's proof must account for *objective* qualifications; exclusion of subjective requirements, such as those encompassed in the definition of "specialized experience," is entirely proper. *See Davis v. Califano, supra,* 613 F.2d at 964. The reason for exclusion is equally clear. Such subjective criteria may well serve as a veil of seeming legitimacy behind which illegal discrimination is operating. If so, measurement of the relation of such a factor to an observed disparity would simply amount to a measure of the amount of discrimination operating through application of the factor. *See Vuyanich I, supra,* 505 F. Supp. at 277; *James v. Stockham Valve & Fitting Co.,* 559 F.2d 310, 331-333 (5th Cir. 1977); Finklestein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases,* 80 COLUM.L.REV. 737, 738-742 (1980). *Cf. Valentino, supra,* 674 F.2d at 73 n. 30 (failure to include (GS) grade level as a variable in regression analysis is proper; "absent clear, affirmative evidence that promotions were made in accordance with neutral, objective standards consistently applied, there is no assurance that level or rank

is an appropriate explanatory variable untainted by discrimination").

Second, plaintiffs were not realistically able to account for the application of so amorphous a criterion as the Civil Service definition of "specialized experience." This circuit has recognized that "[t]he appropriate degree of refinement of the plaintiffs' statistical analysis * * * may depend on the quality and control of the available data." *Trout v. Lehman, supra,* 702 F.2d at 1101. Plaintiffs here relied on the objective evidence available to them—the Justice Department's JUNIPER tapes—to construct their analytical models. Based on this and other evidence reasonably available to them, they could not possibly have quantified the applicable Civil Service requirement of "specialized experience" in a manner that would have made the requirement amenable to statistical analysis. Perhaps DEA has distilled objective proxies for "specialized experience"—as such as prior police experience—that might have been quantifiable, but the record is devoid of any evidence that DEA has in fact done so. Both the policies underlying Title VII and general principles of evidence suggest that the burden of production of such evidence must rest with the defendant. *See Trout v. Hidalgo,* 517 F. Supp. 873, 883 & n. 33 (D.D.C. 1981) ("[o]ne clear purpose of discrimination law, is to force employers to bring their employment processes into the open"), *aff'd,* 702 F.2d 1094 (D.C.Cir. 1983), *vacated on other grounds,* —— U.S. ——, 104 S.Ct. 1404, 79 L.Ed.2d 732 (1984); *EEOC v. Radiator Specialty Co.,* 610 F.2d 178, 185 n. 8 (4th Cir. 1979) (Title VII case following "principle of allocation of proof to the party with the most ready access to the relevant information"); *DeMedina, supra,* 686 F.2d at 1008, 1009 & n. 7.

Third, even if we accept *arguendo* that a second year of specialized experience—or, for that matter, of criminal investigative experience—is a minimum objective qualification, DEA's objections would still fall short in a crucial respect. A strong argument exists that plaintiffs' regres-

sions have implicitly accounted for this variable. Apart from the unsubstantiated declamations of DEA's appellate attorneys, in the record so much as hints that black special agents are less likely than white special agents to possess this qualification. The labor pool that plaintiffs' experts studied comprised only those whom DEA had already hired. All of these individuals had at least one year of prior criminal investigative experience. There is simply no reason to assume that the blacks in such a group of trained, experienced law enforcement officials are less likely than the whites in the same group to have had a second year of "specialized experience" or prior criminal investigative experience. Nor has DEA "articulated * * * [a] basis for the assumption that such skills are in fact unevenly distributed * * *." *DeMedina, supra,* 686 F.2d at 1008. In an analogous situation the court in *DeMedina* established a *"rebuttable* presumption of an equal distribution of the relevant * * * skills." *Id.* (emphasis in original). Such a presumption is equally appropriate here.

This high degree of homogeneity of qualifications among those in the labor pool distinguishes the present case from *Valentino, supra,* where the court did not employ a presumption of equal qualifications. In *Valentino* the court found that "[i]n the setting [of the case] it would be irrational to assume 'equal qualifications' to fill engineering or secretarial vacancies among persons educated the same number of years and employed by the government for the same length of time." 674 F.2d at 71 (footnotes omitted). In other words, the heterogeneity of the labor pool that plaintiff defined precluded any presumption of equal qualifications. In the present setting, by contrast, it would be irrational to assume unequal qualifications.

Since DEA has presented no admissible evidence that black agents are more likely than white agents to lack a second year of requisite experience, plaintiffs' failure to account for this variable does not dilute the force of their

statistical analysis; in the language of the statistician, absent any reason to conclude that the omitted factor correlates with race, the omission of the variable will not affect the validity of the race coefficient in plaintiffs' regression analysis. *See* D. Baldus & J. Cole, *supra*, at 273; *Vuyanich I*, *supra*, 505 F. Supp. at 274.

Though any one of the above reasons would have justified plaintiffs' decision to exclude "specialized experience" as a variable, we note the multiplicity of proper objections to use of this criterion in order to highlight the weakness of this aspect of DEA's challenge. In sum, plaintiffs' statistical proof cannot be faulted for any failure to focus on a population that "closely approximates the characteristics" of those eligible for the positions at issue. *De-Medina*, *supra*, 686 F.2d at 1007. By studying only those whom DEA had already hired, plaintiffs' experts ensured in this case that the group analyzed would possess a relatively similar composite of skills and experience. Thus, on the methodological level, the District Court correctly concluded that plaintiffs' evidence meets the functional test of *Teamsters*, *Furnco*, and *Burdine*.

b. *Explanatory power.* DEA also challenges the explanatory power of plaintiffs' statistical evidence. As a threshold matter DEA argues that because the trial court did not credit any of plaintiffs' specific anecdotal accounts of discrimination, *see* Part I-C & n. 10 *supra*, plaintiffs could not make out a prima facie case unless their statistics showed "gross disparities" of treatment. *See Hazelwood School District*, *supra*, 433 U.S. at 307-308, 97 S.Ct. at 2742. We must therefore decide at the outset whether plaintiffs' lack of anecdotal evidence triggers a requirement that plaintiffs show *gross* disparities of treatment. Beyond this threshold issue DEA argues that plaintiffs' statistics do not show sufficient actionable post-1972 discrimination at sufficient levels of statistical significance to support an inference of discrimination. Thus we must also decide whether the District Court properly found

that plaintiffs had made a sufficient showing of actionable discrimination, both in terms of the magnitude of actionable disparities and in terms of the level of statistical significance.

The effect of a lack of anecdotal evidence. Anecdotal testimony recounting personal experience of discrimination plays an important role in Title VII litigation. "Such testimony may '[bring] the cold numbers convincingly to life.'" *Valentino, supra,* 674 F.2d at 68 (*quoting Teamsters, supra,* 431 U.S. at 338-339, 97 S.Ct. at 1856). The presence of anecdotal testimony bolsters a plaintiff's case, and may become crucial when "the statistical evidence does not adequately account for 'the diverse and specialized qualifications necessary for [the positions in question].'" *Valentino, supra,* 674 F.2d at 69 (*quoting Wilkins v. University of Houston,* 654 F.2d 388, 410 (5th Cir. 1981)).

DEA urges that the converse is equally true; when anecdotal evidence is lacking, statistical evidence must show, as a matter of law, not merely disparities in treatment, but "gross disparities." This argument derives from one sentence in *Hazelwood School District, supra:* "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." 433 U.S. at 307-308, 97 S.Ct. at 2742. Drawing from this sentence a fixed rule that only "gross" disparities suffice absent anecdotal testimony, DEA reads the words for all they are worth, and more.

Neither *Hazelwood* nor any other Supreme Court precedent supports a rule that statistical proof of the kind presented in this case is insufficient absent anecdotal evidence. To make a prima facie case plaintiffs must meet the functional standard of *Teamsters, Burdine,* and *Furnco;* they must present evidence sufficient to support an inference of discrimination. All evidence that a plaintiff presents can contribute to this inference, and should therefore be considered as cumulative. *EEOC v. Ameri-*

can National Bank, 652 F.2d 1176, 1188 (4th Cir. 1981) (reliance on "cumulation of evidence including statistics, patterns, practices, general policies or specific instances of discrimination"), *cert. denied*, 459 U.S. 923, 103 S.Ct. 235, 74 L.Ed.2d 186 (1982). Though anecdotal evidence might bolster a plaintiff's case or reduce the need for strong statistical proof, *see Valentino*, *supra*, 674 F.2d at 69, neither the presence nor the absence of specific anecdotal accounts alters the standard that a plaintiff's initial case must meet.

Read in context the language in *Hazelwood* on which DEA places so much weight will not bear the meaning DEA seeks to impose on it. In the immediately preceding passage the Court, quoting from *Teamsters*, stated: "Evidence of longlasting and gross disparity between the *composition of a workforce* and that of the *general population* may thus be significant * * *." 433 U.S. at 307, 97 S.Ct. at 2741 (*quoting Teamsters*, *supra*, 431 U.S. at 340 n. 20, 97 S.Ct. at 1856 n. 20) (emphasis added). The language to which DEA points refers back to this preceding sentence. Thus, if the Court intended any specific rule by the "gross disparity" language, the Court meant that rule to apply when a plaintiff relies on general population/workforce comparisons and lacks anecdotal evidence. Such a requirement might be appropriate because a population/workforce comparison will usually yield only rough evidence of discrimination; the method is not finely turned to the population of those eligible for and interested in the positions at issue. Absent anecdotal evidence, an inference of discrimination is less secure when such statistics show only slight disparities. When, however, statistical evidence is more finely turned to the relevant labor pool, gross disparities need not be shown to permit an inference of discrimination. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1371 (1983).

Statistics, of course, "are not irrefutable," *Teamsters*, *supra*, 431 U.S. at 340, 97 S.Ct. at 1856, but when a plaintiff's statistical methodology focuses on the appro-

priate labor pool and generates evidence of discrimination at a statistically significant level, no sound policy reason exists for subjecting the plaintiff to the additional requirement of either providing anecdotal evidence or showing gross disparities. Such a rule would reflect little more than a superstitious hostility to statistical proof, a preference for the intuitionistic and individualistic over the scientific and systemic. It is not difficult to understand that discrimination might exist even when affected individuals can point to no specific instances of an employer's discriminatory conduct. The days of Bull Connor are largely past; discrimination now works more subtly. Yet its effects are no less pernicious. " 'In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination * * *.' " *Teamsters, supra,* 431 U.S. at 340 n. 20, 97 S.Ct. at 1856 n. 20 (*quoting United States v. Ironworkers Local 86,* 443 F.2d 544, 551 (9th Cir. 1971)). Statistical proof, crucial to advancing the purposes of Title VII, must not be encumbered with requirements such as those DEA urges here.

In the present case plaintiffs rely on statistical evidence that has been demonstrated to be fine-tuned to the relevant labor pool. *See* Part II-B-1-a *supra.* This case is, in other words, a far cry from *Hazelwood.* If plaintiffs' statistical proof standing alone permits an inference that DEA's employment decisions were more likely than not based on race, then this proof suffices irrespective of the presence of supporting anecdotal evidence. Moreover, were we to require anecdotal evidence plaintiffs would still meet their prima facie burden. Although DEA adequately rebutted most testimony regarding specific instances of discrimination, 508 F. Supp. at 690, 713, the trial court credited much of plaintiffs' nonstatistical evidence, including the testimony of several agents about disparate treatment in disciplinary procedures and supervisory evaluations, and about black agents' general perceptions that DEA was a discriminatory environment. *Id.* at 708-711.

ii. *The sufficiency of plaintiffs' showing of disparities.* Although plaintiffs need not show enhanced or "gross" disparities, they must present evidence that permits an inference of discrimination under the test of *Burdine, Teamsters, and Furnco.* DEA raises two issues with respect to the sufficiency of plaintiffs' showing under this test. The first issue involves the magnitude of *actionable* discrimination shown in plaintiffs' statistics; DEA argues that the District Court improperly relied on nonactionable pre-1972 discrimination reflected in the statistics in finding a prima facie case of discrimination. The second issue involves the statistical significance of the disparities in plaintiffs' regressions.

The magnitude of actionable disparity. DEA has made a very cursory argument that appellees' statistical showing is flawed because the statistics in part reflect pre-1972 discrimination. The brevity of DEA's analysis offers little clue as to the import of this alleged "flaw." We do not understand DEA to be contending that the District Court based its finding of discrimination on the erroneous legal premise that pre-1972 discrimination was independently actionable, for the court explicitly indicated that "Title VII is applicable to DEA only for post-1972 discrimination." Findings ¶ 7d, 508 F. Supp. at 696. Nor do we understand DEA to be contending that statistical evidence reflecting both pre-1972 discrimination and post-1972 discrimination cannot, as a matter of law, suffice to support an inference of post-1972 discrimination. *See Valentino, supra,* 674 F.2d at 71 n. 26 ("failure to factor out time-barred discrimination [does not] discredit the analyses. Statistics tuned to the proper time period are more probative than statistics not so tuned, but categorical rejection of the latter is not warranted"); *Movement for Opportunity and Equality v. General Motors Corp.,* 622 F.2d 1235, 1258 (7th Cir. 1980). Finally, DEA has not even suggested that the District Court did not base its liability determination independently on evidence that did not reflect pre-1972 discrimination.

Despite the shortcomings of DEA's analysis, we have considered with care the possibility that erroneous consideration of pre-1972 discrimination may have infected the lower court's liability determination. This question commands our attention in light of the Supreme Court's recent decision in another Title VII case, *Lehman v. Trout*, —— U.S. ——, 104 S.Ct. 1404, 79 L.Ed.2d 732 (1984). In *Trout* the Court vacated this circuit's affirmance of a District Court finding of discrimination based largely on evidence reflecting both pre- and post-1972 discrimination. To understand the relevance of the Supreme Court's holding to the present case we must trace the course of the court decisions in *Trout*.

Though the plaintiffs' statistics in *Trout* reflected both pre- and post-1972 discrimination, the District Court found the statistics sufficient to support an inference of post-1972 disparate treatment. In dismissing the defendants' objection to the use of the pre-1972 data the court indicated, *inter alia*, that "[i]t is likely that such discrimination before 1972, even if coupled with neutral employment practices since then, produced actionable continuing discriminatory effects after 1972 * * *." *Trout v. Hidalgo*, *supra*, 517 F.Supp. at 880. On appeal this court held that the District Court's "continuing effects" theory was "flatly inconsistent" with the Supreme Court's earlier pronouncements. *Trout v. Lehman*, *supra*, 702 F.2d at 1104. However, because the record indicated to us that the District Court had found, in the alternative, that post-1972 statistics were sufficient to support an inference of disparate treatment, *see Trout v. Hidalgo*, *supra*, 517 F.Supp. at 879 n.14, we affirmed the court's liability determination.

Although the Supreme Court found no fault with our understanding of Title VII principles in *Trout*, the Court vacated and remanded to this court with instructions to remand "to the District Court for findings of fact, based on new evidence if necessary, on the question what evidentiary value respondents' and petitioners' statistical evi-

dence has in light of the Court of Appeals' conclusions of law concerning employment decisions that are not actionable in this case. See *Pullman-Standard v. Swint*, 456 U.S. 273, 292, 102 S.Ct. 1781, 1792, 72 L.Ed. 66 (1982)." *Lehman v. Trout, supra*, —— U.S. at ——, 104 S.Ct. at 1404. Though the Court's opinion was exceedingly brief and its citation to *Pullman-Standard* was unexplained, this citation implies that the Court was acting out of an abundance of caution to protect the sanctity of the trial court's factfinding function. *See Pullman-Standard v. Swint, supra*, 456 U.S. at 292, 102 S.Ct. at 1792. We therefore infer that, in *Trout*, the Court was unsure whether the trial court would have found discrimination absent its erroneous understanding as to the legal significance of "continuing effects." Hence the remand.

At least in the context of this case, the message to be gleaned from *Trout* is that we must proceed with caution if the trial court has made an error of law in finding discrimination, lest we invade the factfinding prerogative of the District Court. If the District Court has found a prima facie case of discrimination "*because of* an erroneous view of the law, "*Pullman-Standard, supra*, 456 U.S. at 292, 102 S.Ct. at 1792 (emphasis added), this court may not take upon itself the task of deciding in the first instance whether the facts nonetheless support an inference of discrimination under a correct understanding of the law.

In this case we have no trouble concluding that the teachings of *Pullman-Standard* and *Trout* do not warrant reversal of the District Court on the ground that the court used some statistics that might reflect pre-1972 discrimination. DEA has not argued on appeal that the use of data reflecting pre-1972 discrimination affected any aspect of the District Court's liability determination other than the findings of salary disparities.[21] Hence,

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[21] Pre-1972 discrimination *may* also have affected the results obtained in some of appellees' grade-at-entry statistics.

even if DEA's argument were well-placed, most of the District Court's liability determination would remain intact. Specifically, DEA has not suggested that this argument has any application to *the District Court's independent findings* that plaintiffs established a prima facie case of discrimination in grade-at-entry, work assignments, supervisory evaluations, discipline, and promotions. *See* 508 F.Supp. at 712-715. And even with respect to the plaintiffs' prima facie proof of salary disparities further factfinding by the District Court is unnecessary. It is far from clear whether the court erroneously reasoned that any disparities resulting from the continuing effects of pre-1972 discrimination were actionable.[22] However, assuming *arguendo* that such a legal error was made, it is clear that the trial court did not make its finding of a prima facie case of salary discrimination *"because of"* any such erroneous view. Two considerations compel this conclusion.

First, as we have explained, the court properly could consider evidence that may have reflected pre-1972 dis-

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However, the trial court found that "[f]or new hires (post 1972) Blacks were 12% less likely than whites to be hired at GS-9, as opposed to GS-7, and this is statistically significant at the .01 level." Findings ¶ 9a, 508 F.Supp. at 698.

[22] The court's 1979 Liability Determination contains no suggestion that the court thought continuing effects were actionable. In fact, the court's repeated statements that DEA could have rebutted plaintiffs' statistics by making a showing that the statistics reflected the continuing effects of pre-1972 discrimination dictates the opposite conclusion. In one isolated sentence in the 1981 Remedial Order the court did state its view that continuing effects of pre-1972 discrimination are actionable under a *continuing violation* theory. Although this is a *correct* statement of the law of this circuit, *see Thompson v. Sawyer*, 678 F.2d 257, 291 (D.C. Cir. 1982); *Bethel v. Jefferson*, 589 F.2d 631, 636-637 (D.C. Cir. 1978), as we indicate *infra* we do not think the record supports a finding that there was a continuing violation here.

crimination in determining that a prima facie case was established. In considering plaintiffs' first regression, which included data on employees hired before 1972, the court acknowledged that it was theoretically possible "that pre-1972 discrimination might affect" the regression. Findings ¶ 7h, 508 F.Supp. at 697. The court, however, expressly found that this effect was unproven [23] and that it might cause the regression to *underestimate* the extent of post-1972 discrimination.[24] The trial court concluded that DEA's failure to test this hypothesis empirically left DEA's criticism "speculative and incapable

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[23] Findings ¶ 7g, 508 F.Supp. at 696 ("It has been neither admitted nor proven that Defendants discriminated against Black special agents prior to 1972."); *see* 508 F.Supp. at 712. In this respect the case is quite unlike *Trout*, where the District Court expressly found that pre-1972 discrimination had occurred and that it was likely that such discrimination had "continuing discriminatory effects after 1972." *Trout v. Hidalgo*, 517 F.Supp. 873, 880 (D.D.C. 1981), *aff'd*, 702 F.2d 1094 (D.C. Cir. 1983), *vacated*, —— U.S. ——, 104 S.Ct. 1404, 79 L.Ed.2d 732 (1984).

[24] The court indicated that:

> Depending on DEA's response to perceived pre-1972 discrimination, said discrimination might have three possible effects on the [relevant] statistics, namely (1) the showing of post-1972 discrimination could be artifically [*sic*] accentuated because it would include pre-1972 discrimination, (2) the showing could be attentuated by any affirmative action taken by DEA to rectify pre-1972 discrimination, and (3) the showing might actually downplay post-1972 discrimination because any affirmative action by DEA was overresponsive to the pre-1972 discrimination. No evidence was presented by Defendants indicating that one of the three possibilities was more probable than any of the others.

508 F.Supp. at 697 n. 3.

of rebutting Plaintiffs' statistical showing."[25] Moreover, based on the second regression (analyzing agents hired after 1972) the court found that "post 1972 discrimination largely contributed "to the statistical results in the first regression. Findings ¶ 7i, 508 F.Supp. at 697.

Given these factual findings the lower court certainly could, and did in fact, permissibly conclude that the first regression established a prima facie case of post-1972 discrimination, and these findings plainly indicate that the District Court did not consider a continuing effects theory to be essential to its findings that a prima facie case of post-1972 discrimination was established.

Second, the District Court's finding that plaintiffs established a prima facie case of discrimination in salaries was *independently* based on statistics pertaining only to employees hired after 1972. The court reviewed these statistics and found that the salary disparities were "statistically significant at or below the .05 level for every year since 1975." Findings ¶ 7d, 508 F.Supp. at 696. It also found that these statistics "tend to downplay the effects of discrimination at DEA because almost half the agents in the 1975 analyses were hired in 1974, and the most serious promotional problems are encountered in the middle and upper grades." Findings ¶ 7e, 508 F.Supp. at 696. The coourt concluded that these statistics evidenced gross salary disparities, and that because of these disparities plaintiffs had established a prima facie case of salary discrimination.[26]

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[25] 508 F.Supp. at 712 (discussing DEA's allegation that plaintiffs' "statistics were insignificant because relevant factors (e.g., pre-1972 discrimination, inflation, and specific types of prior work experience) were omitted from the regression analyses").

[26] In the words of the District Court:

> Plaintiffs have shown gross disparities between the salaries of comparably qualified Black and White agents at DEA. *These disparities are evident in the regression*

In light of the foregoing, we conclude that consideration of some data that might hypothetically reflect continuing effects of pre-1972 discrimination does not dictate reversal of the District Court's liability determination. The District Court's opinion clearly indicates that the court based this determination independently on evidence that did not reflect such discrimination. DEA has not argued otherwise. In these circumstances, due regard for the trial court's role as finder of fact requires us to respect the independent bases on which the District Court grounded its liability determination. Accordingly, we conclude that the court's findings are not "infirm because of an erroneous view of the law." *Pullman-Standard, supra*, 456 U.S. at 292, 102 S.Ct. at 1792.

The statistical significance of the disparities shown. DEA also argues that plaintiffs' salary regressions did not achieve a level of statistical significance sufficient to permit an inference of discrimination.[27] The motion of

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> *analyses* involving all agents for the period 1975-1978, *and* new hires for the period 1976-1978. Because of the significant level of the disparities shown, Plaintiffs have proven a *prima facie* case of discrimination in salary. * * *

508 F.Supp. at 712 (emphasis added).

[27] DEA also argues that plaintiffs' regressions lack probative worth because the R^2 figures are too low. R^2 provides an overall indication of how well the disparity in the dependent variable (salary, in this case) can be explained by all the independent variables. Plaintiffs' first salary regression had R^2 values ranging from .42 to .52. Plaintiffs' second salary regression had R^2 values ranging from .21 to .37. Findings ¶ 7n, 508 F.Supp. at 697. The court found that these values were "not so low as to adversely affect the veracity of Plaintiffs' studies." *Id.* We find no error in this decision, given the high levels of statistical significance that plaintiffs' studies achieved; R^2 is not a measure of statistical significance and is not a highly precise indicator of the probative value of a statistical study. *See* D. BALDUS & J. COLE, *supra* note 7, at 273-274; *Vuyanich v. Republic Nat'l*

statistical significance addresses directly the question whether an inference of discrimination is warranted. Statistical significance is a measure of the probability that the outcome of a statistical analysis would have occurred by chance: The lower the probability that the observed outcome could have occurred by chance, the stronger the inference of discrimination that can be drawn from the data. For example, a finding that a study is significant at the .10 level indicates that the odds are one in ten that the results could have occurred by chance, and a finding of significance at the .05 level indicates that the odds are one in 20 that the result could have occurred by chance. Although the law has not set any precise level at which statistical significance can be said to be sufficient to permit an inference of discrimination, social scientists usually accept a study that achieves statistical significance at the .05 level. D. Baldus & J. Cole, *supra*, at 297; *cf.* F. MOSTELLER, R. ROURKE & G. THOMAS, PROBABILITY WITH STATISTICAL APPLICATIONS 310 (2d ed. 1970). In other words, a study is found significant—and the hypothesis of chance is rejected—when there exists at most a one in 20 possibility that the observed result could have occurred by chance. Several courts have adopted the .05 level as sufficient to support an inference of discrimination in Title VII cases. *Vuyanich I*, *supra*, 505 F.Supp. at 271; *Cooper v. University of Texas*, 482 F.Supp. 187, 194 (N.D. Tex. 1979). The Justice Department itself has adopted the .05 standard as sufficient in this area. *See* Uniform Guidelines on Employee Selection § 14(B)(5), 43 Fed. Reg. 38290, 38301 (1978); 28 C.F.R. § 50.14 (1983).[28]

Bank of Dallas, 505 F.Supp. 224, 273 (N.D. Tex. 1980), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984).

[28] DEA has urged that we adopt the "greater than two or three standard deviations" test of statistical significance that the Supreme Court purportedly established in *Casteneda v. Partida*, 430 U.S. 482, 496-497 n. 17, 97 S.Ct. 1272, 1281

Without deciding whether a plaintiff's initial case might suffice even without meeting the .05 level of significance,[29] we find that the plaintiffs in this case have presented analyses that meet the generally accepted .05 level of statistical significance. All findings of plaintiff's salary regressions meet or exceed the .05 level, except for the showing of discrimination in 1975 against those hired after 1972. As noted above, however, this 1975 finding is skewed by a unique factual circumstance. *See* Part I-B-1 *supra*. For every other year the probability that the observed result occurred by chance was less than one in 20; for most cars the probability was less than one in a thousand. *Id.* Similarly, plaintiffs' statistical analyses of grade at entry, evaluations, and discipline all achieved results significant at or above the .05 level. *Id.* These levels of significance are certainly sufficient to support an inference of discrimination.

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n. 17, 51 L.Ed.2d 498 (1977). A level of two standard deviations corresponds to statistical significance at the .05 level, and a level of three standard deviations corresponds to statistical significance at approximately the .001 level. The huge difference between two and three standard deviations, and the casualness of the Court's language in the footnote DEA points to, together suggest that the Court in *Casteneda* did not intend to fix any specific test for statistical significance. Nor would the court have needed to do so. Since the standard deviations of the statistics used in *Casteneda* ranged from 6 to 12, the Court would have had no reason to fix a precise lower bound for statistical significance. Thus we decline to interpret *Casteneda* as DEA suggests we should. In any event, almost all of plaintiffs' statistics in this case did achieve statistical significance at the .05 (or 2 standard deviations) level.

[29] Some courts have suggested that an inference of discrimination might be permissible even if levels of statistical significance fall short of the .05 mark. *See Vuyanich v. Republic Nat'l Bank of Dallas, supra* note 27, 505 F.Supp. at 272.

Plaintiffs' evidence regarding promotions stands on a somewhat different footing. Disparity was demonstrated at a statistically significant level in promotions from GS-11 to GS-12. This evidence suffices to support the requisite inference of discrimination at the GS-11 to GS-12 level. Statistical evidence purporting to show discrimination in promotions above GS-12 did not achieve acceptable levels of statistical significance. Thus, as the trial court correctly found, 508 F.Supp. at 714, statistics alone will not permit an inference of discrimination in promotions to positions above the GS-12 level.

Nonetheless, we hold that the District Court correctly found that enough other probative evidence exists to permit an inference of discrimination in promotions above the GS-12 level. In the first place, plaintiffs' evidence regarding promotions above GS-12 was not dispositive either way on the issue of discrimination. Since so few promotions occurred at the higher levels of DEA during the relevant time frame, plaintiffs had to rely on a sample too small to generate statistically significant evidence of discrimination. 508 F.Supp. at 701-702, 714. This lack of statistical proof does not, however, prove that no discrimination took place. And other probative evidence does suggest discrimination. Plaintiffs made a prima facie showing of discrimination in initial grade assignments, work assignments, supervisory evaluations, and discipline. These are precisely the factors that determine a special agent's prospects for discretionary promotions at the higher levels of DEA. *See* Part I-A *supra*. With a statistical sample large enough to permit probative results, plaintiffs demonstrated that black agents indeed fared less well in promotions from GS-11 to GS-12 the likely result of discrimination in evaluations, initial grade assignments, work assignments, and discipline. After finding discrimination in the factors that bear most strongly on promotions, and in promotions at the immediately preceding step, the trial court could and did appropriately draw an inference of discrimination in

promotions above GS-12. Although indirect, the evidence permits an inference that discrimination was more likely than not.

2. *The insufficiency of DEA's rebuttal case.* DEA also claims that the trial court erred in its evaluation of DEA's case on rebuttal. DEA first points to two errors of law that purportedly skewed the trial court's evaluation of DEA's rebuttal case: (1) the trial court erroneously placed on DEA a burden of persuasion instead of a burden of production, and (2) the trial court erroneously refused to admit into evidence at the remedial stage of the proceeding DEA's alternative regression analyses. On top of these legal errors, DEA claims, the trial court improperly devalued DEA's rebuttal evidence. DEA contends that in light of these errors and the vulnerability of plaintiffs' initial case, the trial court erred in finding discrimination.

a. *The trial court's allocation of burdens.* In a Title VII case alleging disparate treatment the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra,* 450 U.S. at 253, 101 S.Ct. at 1093. *See* Part II-A *supra.* DEA argues that the trial court violated this precept in analyzing the disparate treatment claim in this case. The controversy turns on the interpretation given the following paragraph in the trial court's opinion:

> The burden of proof in Title VII litigation always remains on the Plaintiff. After the establishment of a *prima facie* case, however, the burden of persuasion shifts to the employer. This burden requires the Defendant to "articulate some legitimate, nondiscriminatory reason." * * * If the Defendant meets the rebuttal burden, the Plaintiff has an opportunity to show that the apparently legitimate reason is, in fact, a pretext. * * *

508 F.Supp. at 711 (citations omitted). Read literally, one sentence in this passage would seem to indicate that

the trial judge erred; he states that a burden of persuasion shifts to the defendant. But read as a whole, the passage indicates that the judge allocated burdens correctly. He states explicitly that the burden of proof *always* remains with the plaintiff, and the burden that he labels "persuasion" he defines as one of "articulation." [30]

A clarification that the trial court issued should remove any doubt on this score. The Supreme Court decided *Burdine* one month after the trial court issued its opinion in this case. Shortly after the Court issued *Burdine* plaintiffs in this case requested a clarification of the trial court's conclusions of law with regard to the applicable burdens of proof. The court responded that it had allocated burdens in conformity with *Burdine*. *See Order of April 30, 1981*, JA 99.

This clarification is sufficient reason to distinguish the present case from *Freeman v. Lewis*, 675 F.2d 398 (D.C. Cir. 1982). In *Freeman* a panel of this circuit held that language almost identical to that of the trial court here was an improper allocation of burdens under *Burdine*. We question whether that panel gave the trial court's language a wholly fair reading, but we decide that the later clarification in the present controversy suffices to demonstrate that the trial court's language here, though perhaps initially ambiguous, did comport with *Burdine's* allocation of burdens.

b. *The decision not to admit DEA's alternative regression analysis.* In deciding the liability issues the trial court admonished DEA for failing to substantiate its attack on plaintiffs' statistics by reworking their analysis. 508 F.Supp. at 712. In response DEA sought to introduce at the remedial phase of the trial an alternative re-

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[30] The burden of articulation applies to DEA's rebuttal of plaintiffs' disparate treatment claims. To the extent that plaintiffs' evidence, and DEA's rebuttal, implicate disparate impact, DEA of course bears the burden of proving the business necessity of the challenged practices.

gression analysis purporting to demonstrate that race did not explain salary differentials at DEA. Refusing to reopen the question of liability, the trial court rejected this proffer of evidence. *See* Part I-C-2 & n. 11 *supra.*

DEA argues on appeal as though this rejected evidence were part of the record, *see, e.g.*, brief for appellants at 69-71, but it is not. Nonetheless we must consider whether the trial court properly excluded the evidence.[31]

In a bifurcated trial the judgment on liability remains interlocutory, and thus subject to the trial court's modification, until the remedial order issues. *Marconi Wireless Telegraph Co. v. United States*, 320 U.S. 1, 47-48, 63 S.Ct. 1393, 1414-1415, 87 L.Ed. 1731 (1943). This principle applies to bifurcated Title VII actions. *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 584-585 (D.C. Cir. 1980). The decision whether to reopen a liability determination is, however, discretionary. On appeal "the critical question is whether there was good cause to do so. Absent a convincing showing that the District Court's answer to this question constituted an abuse of discretion, we will not second-guess its decision." *Trout v. Lehman, supra*, 702 F.2d at 1106.

Trout v. Lehman dealt with the precise issue before us in this case. We found that a trial court had not abused its discretion in refusing a defendant's proffer of rebuttal statistics at the remedial phase of the Title VII trial. Two factors underlay the decision: "the evidence * * * could have been discovered and presented at trial by a duly diligent defendant," and the defendants "offered no good reason whatsoever to explain why their statistical analyses were not produced at trial." *Id.* Though the Supreme Court vacated the *Trout* decision, it did so for reasons wholly unrelated to the question of admissibility of liability evidence at the remedial stage. In fact the

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[31] The evidence has not been subject to the rigors of the adversarial process, and its veracity is therefore far from certain.

Court's remand implicitly approved this circuit's holding that the trial court had not abused its discretion in refusing to admit the evidence; while requiring the District Court to make new factual findings with respect to discrimination, the Supreme Court did not require the District Court to consider the evidence defendant proffered at the remedial stage, or any other new evidence. *Lehman v. Trout, supra,* —— U.S. at ——, 104 S.Ct. at 1404.

In light of the intrinsic strength of the *Trout* reasoning on this point, and the Court's implicit approval of that reasoning, we follow *Trout* here. Plaintiffs filed the complaint in this action in January 1977 and the case came to trial in April 1979. DEA made use of satistical experts, and did offer extensive statistical evidence at the liability phase. Without a doubt, DEA had the time and the resources to develop and present its alternative regressions then. And DEA's arguments at the remedial hearing and on appeal contain not a word of justification for its failure to do so. In light of this unjustified omission, the trial court certainly did not abuse its discretion in refusing to admit DEA's alternative regressions.

c. *The trial court's evaluation of DEA's cohort analysis.* Though its regressions were rejected at the remedial stage, DEA did properly introduce during the liability phase a cohort analysis to rebut plaintiffs' showing of disparity. Cohort analysis is another method to test for race discrimination. Under this approach all employees who start together at the same level are surveyed over the course of an observation period and their comparative progress in salary and promotions is evaluated. DEA's expert divided the special agents into 15 cohort groups, each group comprising agents who started in the same year and at the same initial grade level. The analysis revealed discrimination in four of the 15 groups. For purposes of further evaluation, these four groups were broken into subgroups. Discrimination was still

present in two of the subgroups. After examining the files of agents in these two subgroups, DEA discovered that three agents had been "misclassified." Only when these three agents were excluded did traces of discrimination disappear from the results of the analysis. *See* Tr. at 1910-1914; Findings ¶ 8, 508 F.Supp. at 697-698.

We would overturn the District Court's evaluation of this evidence only if we were to find that evaluation clearly erroneous. Though the District Court may have overstated a bit when it labeled cohort analysis "an untried method of statistical study, unsupported in any published statistical work or judicial decision, 508 F.Supp. at 698, the court was surely correct to reject this particular cohort analysis.

Court have viewed cohort analysis in this area with a wary eye, *see Valentino, supra,* 674 F.2d at 72-73 n. 30; *O'Brien v. Sky Chiefs, Inc.,* 670 F.2d 864 (9th Cir. 1982); *Trout v. Hidalgo, supra,* 517 F.Supp. at 884-885. The flaws that these courts have perceived were perceived in the present case by the District Court. *See* Findings ¶ 8, 508 F.Supp. at 697-698. The court noted that by comparing those who started at the same grade level, the analysis fails to account for possible discrimination in initial grade assignments, an important allegation in this case. More importantly, the court found that DEA's use of cohort analysis in this case was methodologically flawed. The division of the workforce into extremely small segments made it unlikely that this cohort study would detect disparties. Instead of repeatedly disaggregating until groups were too small to generate any statistically significant evidence of discrimination, DEA's expert should have aggregated the significance of the result in each subgroup to derive a test for significance with respect to the class as whole. *See* D. Baldus & J. Cole, *supra,* at 212 & n. 2. In light of this methodological misstep—and the fact that DEA's analysis tended as much to confirm as to refute the presence

of discrimination[32]—the District Court properly discounted the probative value of DEA's rebuttal statistics.

3. *Weighing the evidence.* The analytic application of Title VII's formulaic rules for shifting burdens can come to resemble a furious tennis match. When the volleying is over, however, a Title VII case is like all others: the trier of fact must weigh the plaintiff's proof and the defendant's rebuttal and decide whether plaintiffs have met the ultimate burden of persuasion that the law imposes on them. *See U.S. Postal Service Bd. of Gov. v. Aikens*, 460 U.S. 711, ——, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). We have already evaluated DEA's challenges to the particulars that went into the District Court's balance in this case. Since we have found no errors of law or clearly erroneous findings, all that remains is to examine the court's overall assessment of the evidence. We review with deference. Only if we find the trial court's ultimate decision to be clearly erroneous will we overturn it. *Albermarle Paper Co., supra*, 422 U.S. at 424, 95 S.Ct. at 2374.

Plaintiffs brought in a battery of statistics to prove discrimination at DEA. Their analyses tended to show significant salary disparities between comparably qualified white and black special agents, and discrimination in DEA's initial grade assignments, work assignments, supervisory evaluations, promotions, and imposition of discipline. In response DEA sought primarily to cast sufficient doubt on the existence of race-related disparities to prevent plaintiffs from carrying their burden of persuasion.

To do so DEA argued that plaintiffs were required to show "gross disparities" because they had failed to pro-

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[32] When plaintiffs' experts used an undisputed statistical technique to aggregate across DEA's cohort groups, a salary disparity adverse to black agents, and significant at the .001 level, was found. *See* Tr. at 1937 (testimony of Dr. Spradlin); *id.* at 2001-2003 (testimony of Professor Straszheim); Plaintiffs' Exhibit 53.

duce any credited individual anecdotal accounts of discrimination. We have held that, as a matter of law, plaintiffs were not required to meet this enhanced threshold of "gross disparities." *See* Part II-B-1-b-i *supra*. DEA also argued that plaintiffs' salary regressions had failed to show actionable disparities at levels of statistical significance sufficient to permit an inference of discrimination. We have held that the District Court properly found that the studies did show actionable disparities at sufficient levels of statistical significance. *See* Part II-B-1-b-ii *supra*. In any event, this objection went only to plaintiffs' salary regressions and thus failed to rebut the showings of discrimination in initial grade assignments, work assignments, supervisory evaluations, promotions, and imposition of discipline. The keystone of DEA's defense was the argument that plaintiffs had failed to account for the explanatory variable of prior law enforcement experience. In essence DEA has argued that this variable, not race, explains virtually all of the observed disparities between white and black special agents. DEA styled this argument primarily as an attack on the sufficiency of plaintiffs' prima facie case. In other words, DEA has argued that because plaintiffs failed to account for this factor their initial offer of proof was insufficient to support an inference of discrimination. We have held that plaintiffs' failure to account explicitly for this variable was not fatal to its prima facie case; the trial court properly found that the evidence plaintiffs did present was sufficient, notwithstanding this omission, to support an inference of discrimination. We have held that plaintiffs' failure to account explicitly for this variable was not fatal to its prima facie case; the trial court properly found that the evidence plaintiffs did present was sufficient, notwithstanding this omission, to support an inference of discrimination under the functional test of *Teamsters*, *Furnco*, and *Burdine*. *See* Part II-B-1-a *supra*.

Even if this argument is insufficient to invalidate plaintiffs' prima facie case, it might nonetheless serve as

a legitimate nondiscriminatory explanation for the observed disparities between white and black agents. In other words, even if plaintiffs' omission did not preclude them as a matter of law from making their initial case, DEA's explanation might serve to preclude the ultimate inference of discrimination against black agents under the disparate treatment theory. Claiming that this factor, not race, explains the disparities, DEA has in effect made such an argument. To rebut plaintiffs' disparate treatment claim DEA need not carry the burden of persuasion as to this legitimate nondiscriminatory explanation. *See Burden, supra*, 450 U.S. at 253-254, 101 S.Ct. at 1093-1094. The evidence must, however, cast sufficient doubt on plaintiffs' case to cause the trier of fact not to draw the ultimate inference of discrimination. *See* Part II-A-1 *supra*.

The District Court did not find this rebuttal sufficiently strong to preclude the ultimate inference of discrimination. On review we cannot say that the court erred in this assessment. DEA has introduced no admissible evidence that this alleged differential in prior law enforcement experience exists. As we have noted, there is no reason to assume that black agents in a group with one year of prior criminal investigative experience are more likely than white agents in that group to lack a second year of such experience. *See* Part II-B-1-a *supra*. Nor has DEA presented any admissible evidence that the purported differential in law enforcement experience explains the observed disparities.

Absent such evidence, we are left, as the trial court noted, with mere speculation and conjecture. *See* 508 F.Supp. at 712. Of course, "the most effective way to rebut a prima facie case is to present more accurate statistics." *Trout v. Lehman, supra*, 702 F.2d at 1102. A defendant is not absolutely required to rework a plaintiffs' statistics when, as in this case, the omitted variable

was allegedly too subjective to admit of quantification.[33] A defendant must, however, make some credible showing that the omission skewed plaintiffs' statistics. At a minimum the employer must raise a genuine issue of fact as to the veracity of plaintiffs' proof, and "[t]o accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for" the observed disparity. *Burdine, supra*, 450 U.S. at 254-255, 101 S.Ct. at 1094. "Thus the defendant cannot meet its burden merely through * * * argument of counsel." *Id.* at 255 n. 9, 101 S.Ct. at 1094 n. 9. Because DEA has introduced no evidence to support its purported nondiscriminatory explanation, this rebuttal fails as a matter of law.

On balance, we find no reversible error in the District Court's overall assessment of the evidence. The court properly attributed probative weight to plaintiffs' statistical analyses, and properly rejected the three aspects of DEA's case on rebuttal—the need for gross disparities, the insufficiency of the statistical studies, and the purported failure to account for prior law enforcement experience. In light of these findings, the court appropriately held that DEA had engaged in a pattern or practice of discrimination against black special agents, 508 F.Supp. at 712, and properly held that DEA's initial grade assignments, work assignments, supervisory evaluations, imposition of discipline, and promotion process had disparate impact on black agents. *Id.* at 712-715.[34]

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[33] Of course, when a defendant claims that a specific factor was sufficiently objective to permit quantification, the defendant's failure to present alternative statistics incorporating the factor will severely undermine its rebuttal.

[34] Having found disparate impact in these employment practices, the District Court ordered validity studies "in order to implement effective, nondiscriminatory supervisory evaluation, discipline, and promotion systems[.]" 508 F.Supp. at 715. DEA has not challenged the trial court's application of disparate impact analysis to these specific employment prac-

We therefore affirm the District Court's liability determination in its entirety.

4. *Disparate impact analysis of DEA's rebuttal evidence.* We note finally that even had DEA succeeded in rebutting plaintiffs' disparate treatment case by making a credible showing that the differential in prior law enforcement experience explained the observed disparity, DEA would have done no more than create a situation ripe for resolution under the disparate impact theory. *See* Part II-A-A-1-b *supra.* According to DEA's argument, black special agents appear to do less well throughout the range of DEA's employment system because they tend to start lower in that system as a result of their relative lack of more than one year of prior law enforcement experience. This boils down to a claim that DEA's requirement of a second year of law enforcement experience for entry at GS-9 instead of GS-7 has an adverse impact on blacks because they tend to lack that qualification. Between plaintiffs' and defendants' proof the trier of fact would have had before it all the elements of a traditional disparate impact claim: plaintiffs had shown a disparity and defendant had pinpointed the facially neutral employment practice causing the disparity. In this situation the trial court would properly have applied the disparate impact analysis of *Griggs*, *supra*, and its

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tices. Though these practices arguably encompass some subjective judgments as to agents' performance, we find that disparate impact appropriately applies to them. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 1005-1008 (1982). In ordering validity studies the trial court has neither precluded elements of subjective decisionmaking in DEA's practices nor invalidated the propriety of the traits that DEA's current practices seek to measure. Rather, validity studies seek to find ways to provide more specific guidance to discretionary decisionmakers, and to eliminate those elements of discretionary decisionmaking that are shown to affect black agents adversely without any compensatory showing of business necessity.

progeny. Had DEA made a credible showing that the requirement of an additional year of law enforcement experience caused the disparity, DEA would have been required to show the job-relatedness of such a requirement. *Griggs, supra,* 424 U.S. at 432, 91 S.Ct. at 854; *Albemarle Paper Co., supra,* 422 U.S. at 425, 95 S.Ct. at 2375. DEA has not even attempted any such showing. Thus, even had DEA succeeded in its attempt to articulate a legitimate nondiscriminatory explanation, DEA would still have been found in violation of Title VII under the disparate impact theory.

II. The Remedies Determination

Section 706(g) of Title VII empowers a court that has found illegal discrimination to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1976). The Conference Report accompanying amendment of Title VII in 1972 noted:

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. This broad reading of the need for effective remedies * * * is intended to be preserved in this bill * * *.

Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972). The Supreme Court has also stressed the breadth of this remedial power. *See Albemarle Paper Co., supra,* 422 U.S. at 421, 95 S.Ct. at 2373; *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-764, 96 S.Ct. 1251, 1263-1264, 47 L.Ed.2d 444 (1976).

Having found pervasive discrimination at DEA, the District Court fashioned a tripartite remedial scheme: class-wide backpay for those at GS-11 and above,[35] promotion goals and timetables at DEA's upper levels, and class-wide frontpay for those at GS-11 and above. *See* Mem. Op. and Remedial Order, J.A. 114; Part I-C-2 *supra.* DEA raises three challenges to theses remedies. First, the class-wide backpay award impermissibly circumvents the individualized remedial hearings required by *Teamsters, supra,* 431 U.S. at 361-364, 97 S.Ct. at 1867-1869. Second, the backpay award compensates for nonactionable pre-1972 discrimination. Third, the promotion goals and timetables exceed the court's remedial authority under Section 706(g) and violate the equal protection component of the Fifth Amendment to the Constitution.

A. *Individualized Hearings*

DEA objects to the District Court's decision to forego in this case the individualized relief hearings prescribed in *Teamsters, supra,* 431 U.S. at 361, 97 S.Ct. at 1867.

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[35] Finding most discrimination took place at GS-11 and above, the court did not order class-wide relief for discrimination against black agents at GS-7 or GS-9 during any given backpay year. *See* Mem. Op., *supra* note 9, at 3, JA 116. The court did, however, permit these agents to bring individual claims for relief. Any individual awards at these levels are to be deducted from the class-wide backpay pool distributed to agents at GS-11 and above. *See* Remedial Order at 6, JA 124.

The gravamen of DEA's objection is that class-wide relief may benefit some black agents who were not victims of illegal discrimination. The Court in *Teamsters* stated that when plaintiffs seek relief as "victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Id.* In the wake of *Teamsters* individualized hearings have been common features of Title VII class actions. *See, e.g., McKenzie v. Sawyer,* 684 F.2d 62, 75 (D.C. Cir. 1982).

Though *Teamsters* certainly raises a presumption in favor of individualized hearings, the case should not be read as an unyielding limit on a court's equitable power to fashion effective relief for proven discrimination.[36] The language of *Teamsters* is not so inflexible; after stating that individual hearings are "usually" required, *Teamsters, supra,* 431 U.S. at 361, 97 S.Ct. at 1867, the Court went on to note that "[i]n determining the specific remedies to be afforded, a district court is 'to fashion such relief as the particular circumstances of a case may require to effect restitution.'" *Id.* at 364, 97 S.Ct. at 1869, *quoting Franks, supra,* 424 U.S. at 764, 96 S.Ct. at 1264. Later courts have often faced situations in which the *Teamsters* hearing preference had to bend to accommodate Title VII's remedial purposes. Primarily,

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[36] *McKenzie v. Sawyer,* 684 F.2d 62 (D.C. Cir. 1982), does not mandate individual hearings in every case. The panel in *Sawyer* affirmed a District Court's decision to require individual relief hearings. When, in an exercise of its remedial discretion, a trial court orders hearings, an appellate court is properly reluctant to interfere with that judgment. But the appellate panel in *Sawyer* was not faced with a trial court's decision that individual hearings would effectively preclude relief for most members of the plaintiff class. Thus, *Sawyer's* reiteration of the *Teamsters* hearing preference should not be taken is implying that class-wide relief in the present context would be improper.

courts have not required hearings when discrimination has so percolated through an employment system that any attempt to reconstruct individual employment histories would drag the court into "a quagmire of hypothetical judgments." *Thompson v. Boyle*, 499 F.Supp. 1147, 1170 (D.D.C. 1979) (*quoting Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 50 L.Ed.2d 74 (1979)), *aff'd*, 678 F.2d 257 (D.C. Cir. 1982); *Hamheed v. Int'l Ass'n of Ironworkers*, 637 F.2d 506, 520 (8th Cir. 1980). *See also Stewart v. General Motors Corp.*, 542 F.2d 445, 452-453 (7th Cir. 1976) (pre-*Teamsters*), *cert. denied*, 433 U.S. 919, 97 S.Ct. 2995, 53 L.Ed.2d 1105 (1977); *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969) (same).

Applying these principles to the present controversy, we note at the outset that the District Court did not rush willy-nilly to impose class-wide relief. The court specifically ordered individual relief hearings where feasible. All claims of backpay for discrimination at levels below GS-11 will be resolved in individualized hearings. *See* Mem. Op. at 3, JA 116. At these levels individualized hearings are appropriate because a small number of discernible decisions as to initial grade assignment and promotions will be in issue for each agent. These determinations are akin to those in *Teamsters*, where the required hearings were to involve a single determination as to whether individual plaintiffs had applied and were qualified for particular line driver positions in the trucking industry. 431 U.S. at 371-372, 97 S.Ct. at 1872-1873.

After careful consideration, the District Court here ordered class-wide relief only for discrimination above GS-11. The court had found that discrimination impeded black agents at every turn; blacks faced extra hurdles in DEA's initial grade assignments, work assignments, supervisory evaluations, imposition of discipline, and promotions. At the higher levels the cumulative effect of these pervasive discriminatory practices became severe,

and the increased subjectivity in evaluations gave discrimination more room to work its effects. In such a situation "exact reconstruction of each individual claimant's work history, as if discrimination had not occurred, is not only imprecise but impractical." *Pettway, supra,* 494 F.2d at 262. The District Court here specifically found that "[e]ach major criterion in the promotion process at DEA was tainted by discrimination, making discrimination in the promotion process cumulative. Any attempt to recreate the employment histories of individual employees absent discrimination would result in mere guesswork." Mem. Op. at 2 n. 1, JA 115. Our role in reviewing this determination is limited. "The framing of a remedial decree is left largely in the hands of the district judge, whose assessment of the needs of the situation is a factual judgment reviewable only for clear error * * *" *McKenzie v. Sawyer, supra,* 684 F.2d at 75.

We perceive no error in the District Court's finding that it would be impossible to reconstruct the employment histories of DEA's senior black agents. Examination of discrete promotion decisions, as difficult as even that might be, will not suffice. The decisive criteria for promotions decisions—supervisory evaluations, breadth of experience, and disciplinary history, *see* Part I-A supra —were themselves found to be tainted with illegal discrimination. The court found that discrimination had skewed evaluations of black agents, but the court could have had no way of knowing how much more favorable a particular agent's evaluation should have been, or how a fair evaluation might have affected the agent's chances for obtaining a particular promotion. Similarly, the court found that discrimination in work assignments—leaving black agents with a disproportionately large share of undercover assignments—had impeded black agents in promotions, but the court could have had no way to divine what other broadening experiences a particular agent might have had, and no way to gauge how this hypothetical additional experience would have affected

particular promotion decisions. And though the court found that black agents have been disciplined more frequently and more severely than white agents committing similar infractions, the court could have had no way of knowing exactly what effect the disproportionate disciplinary sanctions had on a particular agent's chances for particular promotions. Finally, because promotions at DEA are cumulative, the effects of discrimination in promotions are also cumulative. Denial of promotion to one grade affects the agent's eligibility for later promotions to higher grades.

To require individualized hearings in these circumstances would be to deny relief to the bulk of DEA's black agents despite a finding of pervasive discrimination against them. In effect, DEA would have us preclude relief unless the remedial order is perfectly tailored to award relief only to those injured and only in the exact amount of their injury. Though Section 706(g) generally does not allow for backpay to those whom discrimination has not injured, this section should not be read as requiring effective denial of backpay to the large numbers of agents whom DEA's discrimination has injured in order to account for the risk that a small number of undeserving individuals might receive backpay. Such a result cannot be squared with what the Supreme Court has told us about the nature of a court's remedial authority under Title VII. "[T]he scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *Teamsters, supra*, 431 U.S. at 364, 97 S.Ct. at 1869. A core purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co., supra*, 422 U.S. at 418, 95 S.Ct. at 2372. "[F]ederal courts are empowered to fashion such relief as the particular circumstances require to effect restitution, making whole insofar as possible the victims of racial discrimination * * *." *Franks, supra*, 424 U.S. at 764, 96 S.Ct. at 1264; *accord Albemarle Paper Co., supra*, 422 U.S. at 418,

95 S.Ct. at 2372 (the District Courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"); *Teamsters, supra*, 431 U.S. at 364-365, 97 S.Ct. at 1869-1870. The trial court found that the particular circumstances of this case required classwide relief for black agents at GS-11 and above to ensure that they were made whole for the pervasive discrimination they have suffered. If effective relief for the victims of discrimination necessarily entails the risk that a few nonvictims might also benefit from the relief, then the employer, as a proven discriminator, must bear that risk. *See Stewart v. General Motors Corp., supra*, 542 F.2d at 452-453.

B. *The Allegation of Class-wide Overcompensation*

In calculating the backpay pool the District Court used the race coefficient of the first of plaintiffs' two salary regressions as the measure of average discriminations as the measure of average discrimination per agent. The first regression measured discrimination against all black agents, including those hired before 1972. This study may therefore have reflected the continuing effects of some discrimination occurring prior to 1972. *See* Parts I-B-1, II-B-1-b *supra*. Since the actionable period in this case commenced on July 15, 1972, use of the first regression might, according to DEA's argument, amount to compensation for some nonactionable discrimination.[37]

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[37] DEA also makes an argument that use of the first salary regression overcompensates plaintiffs based on the R^2 values for this study. DEA argues that, because the R^2 value was roughly .50, only about half of the race coefficient for the years in question actually represents race-related disparity. This argument reveals a basic misunderstanding of the meaning of R^2 figures. An R^2 of .50 does not mean that only half of the race coefficient is attributable to race. Rather, it means that half of the total salary disparity between black and white agents is attributable to the totality of the factors examined

Though the remedial order specifically states that backpay begins to accrue only as of July 15, 1972, *see* Remedial Order at 3, JA 121, DEA argues that a portion of the disparities between black and white agents as of that time (and thereafter) was caused by discrimination before 1972, and that DEA is therefore not liable for that portion.

The District Court found in the Liability Determination that "while pre-1972 discrimination may have affected the statistics * * *, post 1972 discrimination largely contributed to those statistics." Finding ¶ 7i, 508 F.Supp. at 697. The court also noted in the Remedial Order that plaintiffs' regressions "provide an accurate measure of the extent to which blacks at DEA were paid less than comparably qualified whites [and] * * * provide an appropriate basis for classwide relief." Mem. Op. at 3, JA 116 (citation omitted). We are reluctant to disturb the trial court's finding on this factual issue. *See McKenzie v. Sawyer*, *supra*, 684 F.2d at 75. Nonetheless on the record as it now stands, we cannot affirm the District Court's decision to use the first regression as a basis for calculating the backpay pool.

Although the court properly found that the plaintiffs' evidence sufficed to support an inference of actionable discrimination, *see* Part II-B-1-b *supra*, the court's reliance on the first regression to determine backpay is problematic. The court never found that *all* of that regression's race coefficient reflected actionable post-1972 discrimination.[38] To do so the court would have had to find

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in the regression. *See generally* Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 720 (1980). In any event, R^2 is far from a wholly reliable measure of a study's accuracy. *See* note 27 *supra*. For these reasons, we hold that DEA's objection based on R^2 values is without force.

[38] Of course, the court need not have found that all of the discrimination reflected in the regression occurred after 1972 in order to find the regression sufficient to make out a prima

either that all discrimination reflected in the salary disparities occurred after 1972 or that the small portion of "continuing effects" of pre-1972 discrimination reflected in the disparities was the result of a "continuing violation." *See id.* The court made neither finding, and having found in the Liability Determination that pre-1972 discrimination had been "neither admitted nor proven," 508 F.Supp. at 696, the court cannot plausibly rely on a continuing violation theory in the Remedial Order as grounds for using the first salary regression as a benchmark for the backpay pool.

It may be that plaintiffs' first regression does reflect only post-1972 discrimination. DEA's complete failure to present evidence showing pre-1972 discrimination in the regression certainly supports this view. It may also be that the portion of the disparity that reflects continuing effects of pre-1972 discrimination might be actionable on a continuing violation theory. Or it may be that the small amount of continuing effects cannot plausibly be factored out of the study; if so, and if no more precise methods of ascertaining the amount of actionable discrimination are reasonably available to the court, the court would be faced with using either a mildly overcompensatory formula based on the first regression or a significantly undercompensatory formula based on the second regression. Use of the first regression under these circumstances might be permissible.

We cannot, however, resolve these matters on the present appeal. As the Supreme Court stressed in *Lehman v. Trout, supra,* —— U.S. at ——, 104 S.Ct. at 1404, this court must scrupulously respect the factfinding prerogative of the District Court. In this case the District Court has not yet determined whether the first regression reflects only post-1972 discrimination, whether a

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facie case of actionable discrimination. *See* Part II-B-1-b; *Valentino v. U.S. Postal Service,* 674 F.2d 56, 71 n. 26 (D.C. Cir. 1982).

continuing violation occurred that might permit compensation for whatever continuing effects the regression reflects, or whether the small portion of nonactionable continuing effects that might be reflected in the regression cannot be factored out. On remand, if the District Court is unable to find that any of these three factual circumstances exists, the court must devise a new backpay formula.

C. *Promotion Goals and Timetables*

The District Court ordered that one black be promoted for every two whites to positions above GS-12 at DEA until blacks made up 10 percent of all agents at each grade above GS-12 or until five years after the order was entered. DEA objects to this aspect of the remedy for the same reason that it objects to class-wide backpay: some individual agents might receive promotions they do not deserve. DEA argues that promotion goals and timetables exceed a court's remedial power under Title VII unless every person who potentially benefits from the relief has been individually shown to have been discriminatorily denied a specific promotion. According to DEA, Section 706(g) mandates this result. *See* 42 U.S.C. § 2000e-5(g) (1976) ("No order of the court shall require the * * * promotion of an individual as an employee, * * * if such individual was refused * * * advancement * * *."). DEA also argues that such goals and timetables violate the equal protection component of the Fifth Amendment to the Constitution.

Though DEA's claims are not without some superficial appeal, Section 706(g) must not be read as requiring an exact fit between those whom an employer's discrimination has victimized and those eligible under promotion goals and timetables. The language on which DEA relies was aimed at ensuring that Title VII was not read as giving courts authority to remedy racial imbalance as an evil in itself, *i.e.*, absent any finding that illegal discrimination caused the imbalance. *See EEOC v. AT & T*,

556 F.2d 167, 175 (3d Cir. 1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978). The language should not be stretched to support a requirement of absolute precision in fashioning promotion goals and timetables when such a requirement would frustrate effective relief for those who were victimized by discrimination.[39] Every federal Court of Appeals in this nation has approved remedial use of goals and timetables without requiring that each and every potentially eligible person be shown to have been a victim of discrimination.[40] Nor can the imposition of quotas to remedy proven

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[39] DEA has amassed an array of quotes from Title VII's legislative history in support of its contention that promotion goals and timetables are invalid if they benefit any individuals who are not proven victims of discrimination. *See* reply brief for appellants at 20-22. Many in Congress spoke in 1964, and again in 1972 when Title VII was amended, to assure wavering supporters that Title VII could not be applied to grant preferences for those who were not victims of discrimination. These statements are, however, inapposite to the question before us in this case. Those in Congress who made such statements were not considering the issue whether in affording relief for proven discrimination against a broad class some individual nonvictims might benefit in order to ensure that all actual victims benefitted. Rather, these statements were made with reference to the question whether Title VII could be used as a mandate to correct overall racial imbalance in an employer's workforce when such an imbalance had not been shown to be the result of discrimination.

[40] *See Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Chisolm v. U.S. Postal Service*, 665 F.2d 482 (4th Cir. 1981); *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981); *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2d Cir.), *cert. denied*, 455 U.S. 988, 102 S.Ct. 1611, 71 L.Ed.2d 847 (1981); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978); *United States*

discrimination be said to violate the Constitution's guarantees of equal protection. Whatever the current status of affirmative action absent a finding of discrimination, the Supreme Court has made clear that such relief is not unconstitutional when used to remedy proven discrimination. *See Swann v. Charlotte-Mecklenburg School District*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Bakke v. Board of Regents of the University of California*, 438 U.S. 265, 302, 98 S.Ct. 2733, 2754, 57 L.Ed.2d 750 (1978) (Powell, J., concurring); *id.* at 363-386, 98 S.Ct. at 2785-2797 (Bennan, White, Marshall and Blackmun, JJ, concurring).

Nonetheless promotion goals and timetables—even if as admirably crafted as those at issue here—must be used cautiously. Such relief intrudes into the structure of employment relations and may at times upset the legitimate promotion expectations of individuals in the majority group. We must take a careful look at the District Court's decision to use goals and timetables in this case.

We are persuaded that the District Court's order that one black be promoted for every two whites to positions above GS-12 was not appropriate. Strict goals and timetables should not be imposed when "alternative, equally effective methods could * * * supplant resort to a quota." *Thompson v. Sawyer, supra*, 678 F.2d at 294. *See Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 646 (4th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1789, 60 L.Ed.2d 241 (1979); *United States v. City of Chicago*, 549 F.2d 415,

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v. Int'l Union of Elevator Constructors, Local 5, 538 F.2d 1012 (3d Cir. 1976); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); *United States v. Int'l Brotherhood of Electrical Workers, Local 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970).

437 (7th Cir. 1977), *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977); *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974). The District Court did not consider whether less severe remedies might prove equally efficacious in this case. We therefore vacate the District Court's imposition of goals and timetables, and remand for additional consideration of the propriety of such remedies in this case.

In determining whether less severe remedies might prove equally effective the court must evaluate the likelihood that the employer will implement the remedy in good faith. *See Firefighters Institute for Radical Equality v. City of St. Louis*, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981); *NAACP v. Allen, supra*, 493 F.2d at 621. One important indicium is the employer's past behavior in implementing equal opportunity programs, either voluntarily or in response to court order. *See Ass'n Against Discrimination In Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 284 (2d Cir.), *cert. denied*, 455 U.S. 988, 102 S.Ct. 1611, 71 L.Ed.2d 847 (1981); *Firefighters Institute for Racial Equality, supra*, 616 F.2d at 364. This court has some doubt that DEA's past record on equal employment opportunity warrants application of strict goals and timetables. DEA has not been before this court in the past on identical or related claims of discrimination, thus has not shown any recalcitrance in remedying discrimination pursuant to court order. Nor does DEA's overall approach to equal employment matters lead us to conclude that DEA will be unlikely to remedy the proven discrimination in promotions once this court orders it to do so. The record contains significant uncontradicted evidence of DEA's institutional good faith in implementing equal employment opportunity programs (summarized in brief for appellants at 66-67). Of course, the determination of appropriate relief is for the District Court in the first instance. We also vacate the District Court's order of class-wide frontpay because the frontpay order was

premised on the existence of promotion goals and timetables. The District Court is free to impose a new front-pay order on remand if it deems one appropriate.

On remand we encourage the District Court to consider other remedial options to ensure that black agents attain their rightful places at the upper levels of DEA. We note in particular that a promotion bottleneck appears to exist at the GS-12 level. While black agents manage to arrive at this level eventually, few progress beyond this point. In remedying promotion discrimination at this point at all levels, the court is of course free to establish promotion guidelines and to monitor DEA's progress in meeting those guidelines, or to fashion any other appropriate relief.

IV. Other Issues

A. *The Jackson Injunction*

During the course of this proceeding the District Court issued a preliminary injunction against the demotion and transfer of plaintiff Carl Jackson. Order of May 5, 1981, JA 113. Special Agent Jackson, the second highest ranking black agent at DEA, had claimed that the demotion and transfer, and other harassment from a few particular white DEA officials, were in retaliation for Jackson's testimony in this case. It is undisputed that prior to Jackson's testimony his employment history at DEA was exemplary and that after his testimony he was the focus of significant official criticism from these individuals, culminating in his demotion and transfer.

The District Court found that Jackson had made a sufficient showing of likelihood of success on the merits of his claim of retaliation in violation of Section 704(a) of Title VII. 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter * * *."). The court also found a high likelihood of irreparable harm if the injunctive

relief were denied because other black agents, fearful of similar reprisal, would not come forth at the impending relief phase of the proceeding to demand individual relief.

DEA makes no claim that the trial court applied an improper legal standard in granting the Jackson injunction. Rather, DEA makes two factual challenges to the order: (1) the trial court erred in finding that Jackson's testimony caused the subsequent adverse employment action, and (2) the trial court erred in finding that inhibition of other agents at the relief stage constituted irreparable harm. We review the trial court's factual findings with deference. Only if we are left with the definite and firm conviction that a mistake has been made will we overturn the trial court's determination.

Neither of DEA's argument convinces us that a mistake has been made. DEA's first argument turns primarily on the trial court's evaluation of the credibility of DEA's witnesses. *See* brief for appellants at 73-75. We are extremely reluctant to overturn a District Court on a matter of credibility, and we decline to do so here. The District Court, moreover, marshalled extensive evidence to support its finding of causation. *See* Memorandum Opinion of May 5, 1981 at 3-10, JA 103-111. DEA's second argument is frivolous. DEA argues that irreparable harm could not have been found because the trial court ordered class-wide relief, thus obviating the need for individual black agents to come forward at the relief stage. This argument grossly misstates the facts; as DEA is well aware, the trial court also ordered individualized hearings for all claims of discrimination below GS-11. Thus the District Court was wholly correct in anticipating harm if black agents were deterred from coming forward at the relief stage.

While we affirm the District Court's decision to grant preliminary relief to Special Agent Jackson, we note that his claim of illegal retaliation has not been definitively resolved. On remand, we expect the District Court to take appropriate action on this matter.

BEST AVA

B. *Prejudgment Interest*

Plaintiffs cross-appeal the trial court's denial of prejudgment interest. This circuit dealt with the issue of prejudgment interest in Title VII actions against the federal goverment in *Blake v. Califano*, 626 F.2d 891 (D.C. Cir. 1980). In that case we followed the principle that, for reasons of sovereign immunity, a court will not award interest against the United States unless a statute specifically authorizes such an award or evinces Congress' intention to do so. *See Smyth v. United States*, 302 U.S. 329, 353, 58 S.Ct. 248, 252, 82 L.Ed. 294 (1937). Plaintiffs ask us to reconsider the decision in *Blake v. Califano* on the ground that Congress modelled Title VII's remedial scheme on the National Labor Relations Act, which permits interest awards. This argument is without merit. Though Congress did model Title VII's remedial provisions on the NLRA, *see Albemarle Paper Co., supra*, 422 U.S. at 422, 95 S.Ct. at 2373, when Congress did so in 1964 neither the NLRA nor Title VII applied to the federal government. Thus congressional reliance on the NLRA as a model implies nothing about congressional intent to permit interest awards in Title VII suits against the United States. When Congress amended Title VII in 1972 to bring the federal government under its provisions, Congress evinced no intention to waive sovereign immunity as to interest awards. Thus we affirm the District Court's denial of prejudgment interest.

V. Conclusion

This case, like many Title VII class actions, has presented a host of complex legal issues. After careful review, we affirm the District Court's liability determination in its entirety. We also affirm the District Court's remedial use of a class-wide backpay scheme, but vacate the particular calculation of the backpay formula. We vacate the court's imposition of strict promotion goals and timetables, and the class-wide frontpay approach tied

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to the goals and timetables. On remand the District Court is to conduct further remedial proceedings consistent with this opinion.

The particular evidentiary and procedural requirements that have evolved in Title VII cases can greatly aid resolution of complex questions. Care must be taken, however, to ensure that such requirements are not applied in inflexible ways that thwart the purposes for which they were adopted. Such requirements as the "minimum objective qualifications" test, the purported need for anecdotal evidence, and the preference for individual remedial hearings must be applied so as to advance Title VII's goals of ferreting out and remedying employment discrimination. In affirming the District Court's liability determination we stress that tests for the sufficiency of plaintiffs' proof should not be applied in a "rigid, mechanistic, or ritualistic" way. *Furnco, supra*, 438 U.S. at 577, 98 S.Ct. at 2949. In affirming the District Court's use of class-wide backpay, we stress that the primary duty of a court exercising equitable remedial power under Title VII is to fashion a decree that affords complete relief to those victimized by illegal discrimination. On June 12, 1984, while the opinion in the instant case was in the printing stage, the Supreme Court issued its decision in *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984). In considering the issues of appropriate remedies on remand, the District Court should, of course, consider the Supreme Court's opinion in *Stotts*, to the extent applicable. *See Tavoulareas v. The Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984) (In light of recent Supreme Court precedent, "[t]he most efficient course, and the course most respectful of the valid discretion of our district judge, is to remand for reconsideration").

Affirmed in part and vacated and remanded in part.

HARRY T. EDWARDS, Circuit Judge, concurring:

I am in full accord with the result reached in the majority opinion and with most of its rationale. I write separately to emphasize certain points concerning the parties' burdens in a pattern and practice disparate treatment case. Although this case presents a complex factual record, the controlling legal principles are clear. There is some potential for confusion only because there are several important and interrelated legal theories implicated in our analysis. Correctly understood, however, the majority opinion is not only consistent with Supreme Court precedent—it is in fact compelled by that precedent.

A. *Introduction: Cataloguing Title VII Cases*

As the majority correctly explains, a plaintiff in a Title VII action can prove liability under two theories: disparate treatment or disparate impact. A disparate treatment claim posits that the employer has *intentionally* treated the plaintiff less favorably than others because of the plaintiff's race, color, religion, sex, or national origin. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1943, 1954 n. 15, 52 L.Ed.2d 396 (1977). In cases alleging classwide disparate treatment, the plaintiffs' case typically relies heavily on a statistical showing that comparably qualified members of the minority group and the majority group are treated unequally. If the statistical showing is strong enough, courts will infer a discriminatory motive from this disparity in treatment, because such a disparity is "the expected result of a regularly followed discriminatory policy." *Id.* at 361 n. 46, 97 S.Ct. at 1867 n. 46. Cases of this sort are commonly referred to as "pattern and practice" cases because the crux of the plaintiffs' claim is that "discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.* at 336, 97 S.Ct. at 1855.

In a disparate impact case, the plaintiff need not establish discriminatory intent; the focus is on the *consequences* of an employer's practices, rather than the under-

lying motive. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971). Whether the claim of disparate impact is made in an individual suit or in classwide litigation, the court must determine whether the employer utilizes "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Teamsters*, 431 U.S. at 336 n. 15, 97 S.Ct. at 1854 n. 15. *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Griggs*, 401 U.S. 424, 91 S.Ct. 849.

The Supreme Court has established different proof sequences in disparate treatment and disparate impact cases that reflect the functional differences between the two theories. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Court explicated a scheme for *individual* disparate treatment cases that is designed "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 255 n. 8, 101 S.Ct. at 1094 n. 8. Although the burden of proving intentional discrimination remains at all times on the plaintiff, *id.* at 253, 101 S.Ct. at 1093, the Court recognized that there are three stages in the typical individual disparate treatment case:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. at 252-53, 101 S.Ct. at 1093 (citation omitted).

Discriminatory intent need not be proved in a disparate impact case, and the Court has not deemed it necessary to establish shifting intermediate burdens in such cases. Rather, a plaintiff proceeding on a disparate impact theory must prove that the specific employment practice in question "select[s] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.*, 422 U.S. at 425, 95 S.Ct. at 2375. If this showing is made, the defendant can raise "business necessity" as an affirmative defense, and will prevail if successful in proving that the challenged employment practice has "a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854.

B. *Pattern and Practice Cases Involving Mixed Claims of Discrimination*

The plaintiffs in the instant case challenge the DEA's employment system in its entirety and also challenge particular components of that system. In doing so, they allege both a pattern and practice disparate treatment claim and several disparate impact claims. This Circuit has not heretofore fully articulated the parties' respective burdens in a pattern and practice disparate treatment case. *Cf. McKenzie v. Sawyer*, 684 F.2d 62, 71 n. 7 (D.C. Cir. 1982) (noting that "it remains debatable whether the *Burdine* holding that the burden of persuasion remains with an individual plaintiff should be applied to a class action suit alleging disparate treatment"). In undertaking this task, we are mindful of the Supreme Court's frequent reminders that its statements regarding the burdens of proof governing particular types of employment discrimination cases should not be interpreted as "inflexible formulation[s]" (*Teamsters*, 431 U.S. at 358, 97 S.Ct. at 1866 (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)) that are "necessarily applicable in every respect to differing factual situations." *McDonnell Douglas Corp.*,

411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13. *See also Burdine*, 450 U.S. at 252 n. 5 & 253-54 n. 6, 101 S.Ct. at 1093 n. 5 & 1094 n. 6. Nevertheless, the Court has now considered these burdens in a number of contexts and, in my view, its decisions provide a clear basis for articulating an approach in pattern and practice cases.

In applying the Court's decisions to a pattern and practice case, it must be recognized that in some respects a pattern and practice case converges with a disparate impact case. Actions predicated on either theory involve attacks on the systemic results of employment practices. While the plaintiffs in a pattern and practice suit will focus on the intentional discrimination that is demonstrated by the operation of the system in its entirety, they also may make claims that particular components in the system have a disparate impact. Moreover, even if the plaintiffs do not concentrate on these components, *the employer* may deny its discriminatory intent by pointing to a specific, arguably nondiscriminatory, component as the cause of the observed disparity. Hence, either because of the plaintiffs' allegations or because of the employer's defense, the focus of a pattern and practice case may shift or broaden from disparate treatment analysis to include the issue of the employer's liability for specific employment practices that have disparate effects.

As the Supreme Court has unequivocally dictated different approaches depending on whether the focus of a case is intentional discrimination or the effects of specific employment practices, our treatment of pattern and practice actions must account for the permutable nature of these actions. The subsequent discussion delineates the plaintiffs' and defendant's respective burdens in a pattern and practice case, and explains that the nature of these burdens will vary somewhat if the plaintiffs' or defendant's proof implicates disparate impact analysis.

C. *The Plaintiffs' Prima Facie Case in a Pattern and Practice Suit*

To establish a prima facie pattern and practice case "[t]he plaintiffs must, by statistical evidence, individual testimony, or a combination of the two, make a showing adequate to raise the inference that employment decisions were predicated on an illegal criterion." *McKenzie*, 684 F.2d at 71. *Accord Teamsters*, 431 U.S. at 358, 97 S.Ct. at 1866. In evaluating the plaintiffs use of statistical evidence to support their claims, " a court should not 'require proof to a mathematical certainty, . . . [because] there is no such requirement [under Title VII]. Deficiencies in the data base 'may, of course, detract from the value of [statistical] evidence,' but ordinarily would not obliterate its evidentiary value.' " *Trout v. Lehman*, 702 F.2d 1094, 1101 (D.C.Cir. 1983) (quoting *Detroit Police Officers' Association v. Young*, 608 F.2d 671, 687 (6th Cir. 1979) (citations omitted), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981)), *vacated on other grounds*, —— U.S. ——, 104 S.Ct. 1404, 70 L.Ed.2d 732 (1984). In short, "[e]xactness is not required at the *prima facie stage*." *De Medina v. Reinhardt*, 686 F.2d 997, 1009 (D.C.Cir. 1982).

At the same time, the plaintiffs are required as part of their prima facie case to "demonstrate to the court's satisfaction that their statistical comparisons are meaningful." *Trout*, 702 F.2d at 1101. In particular, we have indicated that such statistics must compare the employer's relevant work force with "the qualified population in the relevant labor market." *Davis v. Califano*, 613 F.2d 957, 963 (D.C. Cir. 1979) (as amended Feb. 14, 1980) (footnote omitted). In some situations—where the "job skill . . . involved . . . is one that many persons possess or can fairly readily acquire"—the plaintiffs may rely on general population data to establish the qualified population in the relevant labor market *Hazelwood School District v. United States*, 433 U.S.. 299, 308 n. 13,

97 S.Ct. 2736, 2742 n. 13, 53 L.Ed.2d 768 (1977). However, in cases in which "special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.* Although we have held that certain subjective criteria and other qualifications that are not minimum necessary requirements for a position need not be taken into account in the plaintiffs' statistics, *Davis*, 613 F.2d at 964-65, we have suggested that "the *minimum objective qualifications* necessary for one to be eligible for promotion must be considered in the statistical data presented initially by a plaintiff." *Id.* at 964. *See also Valentino v. United States Postal Service*, 674 F.2d 56, 68 (D.C. Cir. 1982).[1]

Recognizing that plaintiffs "need not present a perfect statistical analysis at the prima facie case stage," *Trout*, 702 F.2d at 1101, our cases have shown some flexibility in considering whether the plaintiffs have adequately accounted for minimum objective qualifications. In *De*

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[1] Although we have sometimes stated this rule in terms that go beyond the factual contexts in which it was at issue, these prior pronouncements may not be as all-encompassing as their language suggests. *Hazelwood* and *Teamsters* indicate that in cases in which the general population has or can acquire the *skills* necessary to perform a job, general population comparisons are quite probative. Neither case suggested that the plaintiffs had to consider whether *specific qualifications* required by an employer were generally satisfied by the comparison group. *See De Medina*, 686 F.2d at 1004, 1007 (discussing *Hazelwood*). Furthermore, so far as I can determine, this Circuit has never considered a case in which the qualifications themselves were claimed to be imposed in furtherance of a discriminatory motive. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1356-57 (2d ed. 1983) ("some courts have held that the plaintiff need not present data on the qualified labor market where the qualifications themselves are in question") (footnote omitted).

Medina, we held that plaintiffs need not control for specific minimum job qualifications, as long as their data include a reasonable proxy for these qualifications. We explained that "[t]he objective is to define 'a population that closely *approximates* the characteristics of those who would be *likely* to apply' and 'meet legitimate threshold qualification requirements.' " *De Medina*, 686 F.2d at 1007 (quoting D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 120 (1980) (emphasis added in *De Medina*)). *See also Trout*, 702 F.2d at 1103 (indicating that plaintiffs' proxy for computer-related experience qualification provided "a perfectly adequate basis for inferring disparate treatment"). Additionally, if there is no available data that permits the plaintiffs to account for minimum objective qualifications, we have recognized a "rebuttable presumption of an equal distribution of qualifications between minority and majority group applicants." *De Medina*, 686 F.2d at 1008 n. 7.

Despite these refinements of the minimum objective qualification "rule," the plaintiffs' task in attacking systemic discrimination is not an easy one. It includes important burdens of proof and significant litigation choices. If the plaintiffs proceed on a pattern and practice treatment theory, to establish a prima facie case their proof of a regular pattern of differential treatment must be sufficiently convincing to permit the factfinder to infer a discriminatory motivation. If the plaintiffs believe that the systemic discrimination is in part the result of minimum objective qualifications or other employment practices having an adverse impact on minorities, they may proceed on a disparate impact theory as well. In other words, plaintiffs may proceed on either a disparate treatment theory or a disparate impact theory, or both, because either or both may be implicated in a pattern and practice suit.

D. *The Defendant's Rebuttal in a Pattern and Practice Suit*

The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093. Because the plaintiffs' proof of a prima facie case provides an adequate basis for inferring disparate treatment, the defendant must respond by coming forward and rebutting this reference. *See Teamsters*, 431 U.S. at 360, 97 S.Ct. at 1867.

The defendant's rebuttal in a pattern and practice case can proceed in a number of ways, but must be designed to meet the proof offered by the plaintiffs. *Teamsters*, 431 U.S. at 360 n. 46, 97 S.Ct. at 1867 n. 46. Typically an important part of the plaintiffs' proof in such a case will be statistical evidence. The defendant may attempt to discredit the plaintiffs' statistics "by demonstrating flaws in the assumptions, data or analyses presented." *Vuyanich v. Republic National Bank*, 521 F.Supp. 656, 663 (N.D. Tex. 1981), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984). *But see Trout*, 702 F.2d at 1102 ("unquantified, speculative, and theoretical objections to the proffered statistics are proper given little weight by the trial court"). The Supreme Court has also pointed out that if "the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own." *Dothard v. Rawlinson*, 433 U.S. 321, 331, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977). *See also Trout*, 702 F.2d at 1102 ("the most effective way to rebut a statistically based prima facie case is to present more accurate statistics"). Finally, the employer can try "to provide a nondiscriminatory explanation for the apparently discriminatory result." *Teamsters*, 431 U.S. at 361 n. 46, 97 S.Ct. at 1867 n. 46.

While these propositions are well established, two points are raised in the majority discussion of the defend-

ant's rebuttal that warrant elaboration. The first is the question of the defendant's *burden* in rebutting the plaintiffs' prima facie case. While it is clear that the defendant does not have the burden of proof, this does not tell us what *is* required of the defendant's rebuttal and when this rebuttal will necessitate a response by the plaintiffs. The second question raised by the majority is whether there are circumstances in which the defendant's rebuttal to a pattern and practice *disparate treatment* claim provides a sufficient basis for a court to conclude that *disparate impact* has been established.

1. *The Burden of Defendant's Rebuttal*

In determining the burden that the defendant must satisfy in rebutting the plaintiffs' prima facie case, we are guided by several Supreme Court decisions rendered over the past decade. The starting point is the Court's decsion in *Teamsters*, as it also involved a pattern and practice claim. In *Teamsters*—a suit bought by the Government—the Court explained that once the Government established a prima facie case "[*t*]*he burden then shifts to the employer to defeat the prima facie* showing of a pattern or practice *by demonstrating* that the Government's proof is either *inaccurate or insignificant.*" 431 U.S. at 360, 97 S.Ct. at 1867 (emphasis added). The Court also indicated that "[i]f an employer fails to *rebut the inference* that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy." *Id.* at 361, 97 S.Ct. at 1867 (emphasis added). Because the defendant's proof failed to satisfy this standard in *Teamsters*, the Government was not required to respond with additional proof on behalf of the minority claimants; the evidence initially presented was sufficient for the trial court to conclude that the Government had met its ultimate burden of proving a pattern and practice of discrimination by a preponderance of the evidence.

Hence, *Teamsters* indicates that after the plaintiffs present a prima facie pattern and practice case, the defendant's rebuttal must be sufficient to convince the trier of fact that the plaintiffs have not carried their ultimate burden or the plaintiffs will prevail without further evidence. Absent a clear indication from the Supreme Court that we should depart from this "common allocation of burden in a civil suit" (*see Vuyanich*, 521 F.Supp. at 663), the approach employed in *Teamsters* must govern our adjudication of a pattern and practice case.

The Court's more recent decision in *Burdine* does delineate a somewhat different, three-stage inquiry to govern individual disparate treatment cases. The Court indicated that at the second stage of this inquiry—*i.e.*, the defendant's rebuttal of the prima facie case—the defendant must produce evidence raising "a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. 254-55, 101 S.Ct. 1094 (footnote omitted). This rebuttal burden can be satisfied if the defendant provides a clear explanation of the nondiscriminatory reasons for its action. *Id.* at 260, 101 S.Ct. at 1097.

The nature of the defendant's rebuttal burden in an *individual* disparate treatment case must, however, be understood as a function of the relatively minimal burden borne by the individual plaintiff in proving a prima facie case. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Court held that this prima facie case can be established if an individual plaintiff shows "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* at 802, 93 S.Ct. at 1824 (footnote omitted). A plaintiff providing such proof has eliminated the "two most common legiti-

mate reasons" for his failure to obtain the job, and creates an inference of discrimination unless the defendant comes forward and offers a legitimate explanation for its treatment of the plaintiff. *Teamsters*, 431 U.S. at 358 n. 44, 97 S.Ct. at 1866 n. 44. In other words, if a plaintiff satisfies the *McDonnell Douglas* four-prong test, this creates a rebuttable 'presumption that the employer unlawfully discriminated against' him." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983) (quoting *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1090).

Although the *McDonnell Douglas* test is a useful framework for initial consideration of a discrimination claim, the presumption that results from the test is relatively weak. If the plaintiff's evidence does no more than satisfy the four prongs of the test, the plaintiff has only eliminated two of many possible nondiscriminatory explanations for the employer's decision. When the employer responds by clearly articulating a nondiscriminatory reason for the decision, the factfinder has no basis for inferring that discrimination is a more likely explanation. At this point the legally mandatory presumption of discrimination resulting from the *McDonnell Douglas* test "drops from the case." *Burdine*, 450 U.S. at 255 n. 10, 101 S.Ct. at 1095 n. 10. The presumption and the defendant's rebuttal have served the useful function of focusing the injury on particular explanations for the employer's decision. *See id.* at 255 n. 8, 101 S.Ct. at 1094 n. 8. The plaintiff must now meet her "ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256, 101 S.Ct. at 1095.

Burdine established a workable means for the parties' focus to shift away from the *McDonnell Douglas* inquiry when that inquiry is not dispositive of the ultimate ques-

tion of intentional discrimination. In some cases, however, the plaintiff's initial showing will go beyond that required by *McDonnell Douglas*. In *Burdine* the Court recognized this possibility and explicitly stated that in such cases, the plaintiff may not need to come forward with additional evidence in responding to the defendant's rebuttal:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. *Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.*

Burdine, 450 U.S. at 255 n. 10, 101 S.Ct. at 1095 n. 10 (emphasis added). This conclusion is not surprising. The plaintiff's burden is to justify the inference of discrimination by a preponderance of the evidence. As *Teamsters* indicated, if the defendant does not introduce sufficient evidence in rebuttal to lead the factfinder to conclude that this burden has not been sustained, the plaintiff need not come forward with additional evidence to prevail in the case.

A pattern and practice case is analogous to this latter group of cases envisioned in *Burdine*. The initial proof demanded of plaintiffs in a pattern and practice case typically goes far beyond the minimal showing that is required for an individual to establish a prime facie case under *McDonnell Douglas*. In order to establish a prima facie pattern and practice case, the plaintiffs must pre-

sent meaningful statistics or other evidence demonstrating that comparable groups have been consistently treated differently. In cases such as this—where the "plaintiff class [necessarily] loads overwhelming force into its opening shot," *Vuyanich*, 521 F.Supp. at 661—*Burdine* indicates that the defendant's rebuttal may not require the plaintiffs to present additional evidence at a third stage. This will be so unless the defendant's proof casts "sufficient doubt on the plaintiff's proof to cause the trier of fact to conclude that the plaintiff has not proved discrimination by a preponderance of the evidence." *Vuyanich*, 521 F.Supp. at 663.

In reaching this conclusion, the *Vuyanich* court correctly observed that the "initial thrust" of the plaintiffs' proof in a pattern and practice case often "combines the first and third steps of the *Burdine* model by demonstrating discrimination against protected groups, and pretext, at the same time." *Id.* In an individual case, significant questions will remain to be addressed if the *McDonnell Douglas* presumption "drops from the case." However, in a pattern and practice case, the parties usually focus on the ultimate issue from the very beginning, and additional evidence may be unnecessary after the defendant's rebuttal.

In some cases it may be unclear whether the defendant's rebuttal casts sufficient doubt on the plaintiffs' evidence; consequently, plaintiffs may choose to respond to the challenges raised by the defendant. The point worth stressing, however, is that if the defendant has not cast sufficient doubt, plaintiffs are not *required* to respond in order to prevail in the case. On the other hand; if the defendant's rebuttal is sufficient, the plaintiffs must respond in an effort to meet their ultimate burden of proof in order to prevail.

Finally, it should be noted that the conclusion we reach today is also dictated by the Supreme Court's admonition in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403

(1983), that mechanistic attention to the rules governing "the allocation of burdens and order of presentation of proof," *id.* 103 S.Ct. at 1482 (quoting *Burdine*, 450 U.S. at 252, 101 S.Ct. at 1093), must not cause us to either lose sight of what is ultimately at issue or "treat discrimination differently from other ultimate questions of fact." *Id.* In *Aikens*, the Court indicated that when a defendant had in fact rebutted an individual plaintiff's proof of discrimination, the district court and an appellate court need no longer focus on whether the plaintiff's prima facie case had been established; the focal issue was whether the plaintiff had carried his ultimate burden. *Id.* at 1481, 1482. In the same manner, in evaluating the defendant's rebuttal in a pattern and practice case, courts must keep in mind that the plaintiffs' ultimate task is to establish their case by a preponderance of the evidence. If this burden is satisfied at the close of the defendant's presentation, the plaintiffs necessarily prevail.

I have examined the relevant Supreme Court cases at some length because of the importance of the issue being considered. I believe that the views expressed are in full accord with the intended rationale in the majority opinion. I also believe that the cited case law uniformly and unequivocally dictates the standard that we have articulated today.

2. *Defenses that Implicate Disparate Impact Analysis*

I am in complete agreement with the expressed view in the majority opinion indicating that a court can conclude that an unlawful disparate impact has been established when the following conditions are satisfied:

> (1) The preponderance of the evidence—*whether introduced by the plaintiffs or the defendant*—proves that one or more *specific employment practices* have a disparate impact;
>
> (2) either the plaintiffs or defendant argue that the practices have a disparate impact, thereby putting

the defendant on notice of the need to prove the business necessity of the practices; and

(3) the defendant fails to prove business necessity.

When these conditions are met, the majority correctly explains that "the essential elements of a disparate impact case will have been placed before the trier of fact," and the case is "ripe for resolution using disparate impact analysis." Maj. op. at 1270 (footnote omitted). *See generally Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). So long as the defendant has adequate notice of the need to prove business necessity, it is irrelevant that this duty is prompted by the defendant's, rather than the plaintiffs', proof.

Thus, if a defendant merely cites an allegedly neutral employment practice as a possible explanation for disparaties shown in a pattern and practice treatment suit, plaintiffs' case may be expanded to include a theory of disparate impact. If plaintiffs can then prove that the cited practice has an unlawful impact, or if defendant effectively concedes the presence of unlawful discriminatory effects, then the burden shifts to the defendant to prove that the cited practice is justified by business necessity. *See Albemarle Paper Co.*, 422 U.S. at 425, 95 S.Ct. at 2375; *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854.

In resolving complex employment discrimination cases of the sort here at issue, a court should focus on the actual evidence in the record and not on the parties' litigation strategies. In my view, there is no doubt that a suit initially perceived by the parties to be a disparate treatment case may be expanded into a case of mixed claims (including both disparate treatment and disparate impact) or transformed into a case resting on a new single theory (*i.e.*, disparate impact instead of disparate treatment). It is also clear that these changes may be initiated by virtue of plaintiffs' allegations and proofs or

the defendant's defense. However, under *Albemarle* and *Griggs*, a defendant does not have to prove the "business necessity" of an otherwise neutral employment practice absent plaintiffs' proof (or defendant's concession) of its unlawful discriminatory effects.

CONCLUSION

I commend the majority opinion for its exhaustive analysis of this case, and for clarifying the law in a manner that benefits plaintiffs and defendants alike. Although I have seen fit to express certain of my views, I am generally in accord with the rationale and holdings of the majority opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 77-0081

HENRY W. SEGAR ET AL., PLAINTIFFS

v.

BENJAMIN R. CIVILETTI ET AL., DEFENDANTS

[Feb. 6, 1981]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

AUBREY E. ROBINSON, Jr., District Judge.

This is a class action brought against the Drug Enforcement Administration (DEA) alleging racial discrimination against Black special agents of the DEA in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* The Plaintiff class is composed of "all Blacks who currently serve as special agents, who have been discharged from special agent positions, who have unsuccessfully applied for special agent positions, and who in the future will apply for special agent positions in DEA (or in any predecessor or successor organization)." The two individual Plaintiffs are Henry W. Segar and Morris H. Davis.

Plaintiffs allege that DEA engaged in racially discriminatory practices against Black special agents and special agent applicants in all aspects of the employment process,

to wit: (a) recruitment and hiring, (b) initial grade assignments, (c) type of appointment, (d) type of work performed, (e) training, (f) discipline, (g) supervisory evaluations, (h) awards and promotions, and (i) salary. Plaintiffs' recruitment and hiring claims were settled prior to trial, and the procedures of Rule 23 of the Federal Rules of Civil Procedure are being implemented for those claims. Trial on the remaining claims was bifurcated, and the liability issues were tied beginning on April 9, 1979, and concluding on April 24, 1979.

FINDINGS OF FACT

A. Background

1. Defendant DEA is the agency of the Department of Justice responsible for the enforcement of federal criminal laws concerning the illegal sale, distribution, and use of drugs, and the regulation of the legal trade in controlled drugs. The history and structure of DEA may be summarized as follows:

a. Prior to 1968, the enforcement of Federal criminal laws against traffic in illegal controlled substances and the diversion of legally produced controlled substances to the illicit market was the task of the Federal Bureau of Narcotics (FBN) in the Department of Treasury and the Bureau of Drug Abuse Control (BDAC) in the Department of Health, Education, and Welfare. In 1968 the Bureau of Narcotics and Dangerous Drugs (BNDD) was formed and placed in the Department of Justice. The creation of the BNDD was, in effect, a merger of the FBN and BDAC.

b. In 1973 the BNDD was abolished, and its functions, manpower, and budget were transferred to the newly created DEA. From its inception until August 1, 1977, DEA had 13 domestic and six foreign regional offices. On August 1, 1977, one domestic and two foreign offices were abolished. On October 1, 1978, the number of domestic offices was reduced from twelve to five.

c. Criminal investigators in DEA are known as "special agents." They conduct surveillance of suspected narcotics dealers and do related undercover work; transact "buys" of illegal drugs as evidence for prosecution; develop cases for prosecution by United States Attorneys and supervise the work of other special agents. As of October 21, 1978, DEA employed approximately 1,967 special agents, of whom 138 (7%) were Black.

d. DEA has one Administrator, one Deputy Administrator, and seven Assistant Administrators based at Headquarters. These are supergrade positions.

e. The highest official in each DEA region is the Regional Director (RD), which is a GS-17 position. Each region has a regional office headed by the RD, and one or more district and resident offices. Each district office is headed by a Special Agent-in-Charge (SAIC) and each resident office is headed by a Resident Agent-in-Charge (RAIC). SAIC's are GS-14, GS-15, and GS-16 positions. RAIC's are GS-13 and GS-14 positions.

f. In the field offices, most agents are assigned to operating groups of approximately fourteen persons. Most groups are designated as enforcement groups, but some, such as intelligence and conspiracy groups, are assigned specific kinds of work. Each group is headed by a supervisor. The Group Supervisor supervises the day-to-day work of group members, evaluates the members' performance once a year, and has authority to recommend them for promotions, awards, and special training. Group Supervisors are GS-14 positions. Non-supervisory special agents positions are at the GS-7 to GS-13 levels.

g. The minimum requirements for a GS-7 entry level investigative position include three years of general and one year of specialized experience. For a GS-9 entry level investigative position, three years of general and two years of specialized experience are required. The general experience must have involved progressively responsible experience which has required (1) ability to work or deal effectively with individuals or groups, (2)

skill in assembling and collecting pertinent facts, (3) ability to prepare clear and concise reports, and (4) ability and willingness to accept responsibility. Successful completion of one year of college credit may be substituted for nine months of general experience; successful completion of a four year college program may be substituted for the three years general experience requirement. The specialized experience must have involved progressively responsible experience which demonstrated (1) initiative, ingenuity, resourcefulness, and judgment required to collect, assemble, and develop facts, (2) ability to think logically and arrive at sound conclusions, (3) skill in the writing and presentation of investigative findings, and (4) tact, discretion, and capacity for obtaining the cooperation and confidence of others. For the criminal investigator or special agent positions, an applicant must have at least one year specialized experience in criminal investigations or comparable experience.

h. DEA can hire an applicant who meets the GS-9 or above minimum requirements at the GS-7 level. Prior to 1978, the decision whether to hire an applicant for special agent above the GS-7 level was made by the RD in the region where the applicant applied. In 1978 hiring authority was transferred to Headquarters; consequently, initial grade assignments for post 1978 applicants are made there.,

i. DEA has the authority to make 154 appointments for the special agent position under Civil Service Regulation 213.2110(c) (Schedule A authority). These appointments are conditional; and applicant becomes "excepted" upon satisfactory completion of a one year trial period. Schedule A authority was created to recruit persons with unique combinations of background (e.g. race and ethnicity) and skills (e.g. knowledge of a particular occupation such as pilot, seaman, or musician). While the selection process for Schedule A employees is the same as that for other agents, those employees do not have appeal rights to the Civil Service Commission and cannot be ap-

pointed to supervisory positions. A Schedule A employee can, however, convert to regular Civil Service upon certification by the Civil Service Commission. To become certified, the Schedule A employee must pass one of two examinations.

2. Special agents carry out the enforcement activities of the DEA. These activities range from administrative and supervisory duties to the duties of the "street agent." A street agent's duties range from conducting surveillance of suspected narcotics dealers and doing related undercover work to developing cases for prosecution by United States Attorneys. The work procedures of special agents may be summarized as follows:

a. Race and ethnicity influence the location of the assignment of an agent. All other factors being equal, DEA will send a Spanish speaking agent for work in Mexico and a Black agent for work in Detroit (where the majority of violators are Black).

b. This relation of race to location has not resulted in heavy concentration by race in particular areas. The most recent study found that the New York region has 9% Black agents in its workforce; the Miami region has 12% black agents; Black agents comprise 7% of DEA's special agent workforce.

c. DEA's enforcement focus has changed substantially in the past several years. The agency is now aiming its efforts at network elimination rather than individual elimination. With this change of focus there has been a corresponding reduction in the amount of time agents spend working undercover on the streets.

d. While special agents work in groups, the group supervisor does not always make work assignments. Junior agents receive more supervision than senior agents and, accordingly, have less control over cases. Undercover work is both assigned to agents and developed by agents on their own initiative.

e. While it is difficult to ascertain exactly how much time is spent by each agent performing undercover work,

DEA has a form on which estimated undercover time is placed. Form 371 is not highly probative because the form does not define undercover work, and there is no requirement that the form, which is filled in by the supervisor, be verified. Nevertheless, Form 371 provides that Court with objective evidence indicating how much time each agents spends undercover.

f. Because DEA has chosen to infiltrate drug networks primarily from the bottom up, and because DEA assumes that race and ethnic homogeneity are extremely helpful for this type of infiltration, Black agents perform a greater degree of undercover work than white agents.

3. Special agent promotions from GS-7 to GS-9, GS-9 to GS-11, and GS-11 to GS-12 are non-competitive. To receive such a promotion, an agent must serve one year in grade, be recommended by his group supervisor, receive concurrence in this recommendation by a second level supervisor, and have the recommendation approved by the Regional Director. Prior to October 1, 1978, promotions from GS-12 to non-supervisory GS-13 positions were made on a regionally competitive basis. To receive such a promotion, an agent was normally required to serve at least two years in grade, be placed on a best qualified list by a regional career board, and be selected by the regional director. Since 1978, those promotions are considered by the Headquarters GS-13 promotion board.

4. Promotions from GS-13 to GS-14, from GS-14 to GS-15, and, since October 1, 1978, from GS-12 to GS-13 are competitive agency-wide. All Headquarters and overseas positions are likewise competitive agency-wide. To receive such a promotion or assignment, an agent must satisfy the minimum in-grade requirement, be placed on the best qualified list by the appropriate rating and ranking board, and be selected by the appropriate selecting official. In making its determinations, the rating and ranking boards rely primarily on the agent's most

recent performance appraisal, information on disciplinary action within the last two years, and the appellant's application and profile sheet. Agents are then ranked numerically. When the numerical rating system was first implemented in 1976, point values were identified and assigned as follows: length of experience (20), breadth of experience (30), performance evaluation (40) and education and training (10). DEA modified this rating system in 1977 by replacing length of experience with diversity of experience. In 1978 the rating system was again modified, and 45 points were assigned to breadth of experience, 45 points for performance evaluation, and 10 points for training. Breadth of experience contains the following subcategories: supervisory experience (8), complex investigation experience (6), internal security experience (7) diverse domestic (6) and foreign (7) experience, and special skills (4). Performance evaluation contains the following subcategories: most recent annual rating (25) supervisor's comments (15) and awards (5). Rating and ranking boards are not provided any guidance for assigning points; attaching point value to an agent's application is done on the basis of judgment. Appointments at the GS-16 level and above are made at the discretion of the Administrator.

5. DEA also has procedures for dealing with allegations of agent misconduct. The DEA investigates such allegations if they are made against agents by bona fide individuals and the alleged violation falls within the jurisdiction of the DEA. After a thorough investigation, the investigating official decides whether a disciplinary action should be brought. In 1977, about 30% of the allegations giving rise to an investigation came from within the DEA; 70% came from other sources. In 1977 and 1978 between 60% and 70% of the allegations have proven to be unfounded.

B. Statistical Evidence

6. Plaintiffs produced statistical evidence and testimony of Drs. Barbara Bergmann and Mahlon Straszheim, two economists from the University of Maryland. Both have Ph.D's in Economics and have done scholarly work in the field of discrimination. Plaintiffs also introduced the testimony of James Outtz, Ph.D., an industrial psychologist who is an expert in the employment discrimination area. Defendants produced the statistical evidence and testimony of Drs. Martin Kurke, J. Wanzer Drane, and B. C. Spradlin. Dr. Kurke has a Ph.D. in engineering psychology and social psychology. Drs. Drane and Sprandlin are experts in statistics. All of the above individuals are experts within the meaning of Article VII of the Federal Rules of Evidence; the evidence presented by them is not diminuted due to defects in their expertise.

7. The average salary of Black DEA agents has been and is substantially below that of white agents. As of January 1, 1975, Blacks earned on average $17,637, while whites earned $20,604. As of October 1978 Blacks earned on average $26,232, while Whites earned $29,490. The differentials are $2,967 and $3,258 respectively. The statistical evidence presented by Plaintiffs regarding the disparity in salaries may be summarized as follows:

a. Plaintiffs' experts ran regression analyses to test the legitimacy of the salary disparity. The variables in the analyses, entered simultaneously, were (a) years of federal experience, (b) years of nonfederal experience, (c) level of educational attainment, and (d) race. These are the only variables contained in the JUNIPER system (JUNIPER is the Department of Justice's computerized data system).

b. The results of these analyses are, with respect to race:

DATE	RACE COEFFICIENT	T-RATIO
1/1/75	—$1,628	4.65
1/1/76	—$1,744	5.37
1/1/77	—$1,706	5.15
1/1/78	—$1,934	5.15
10/1/78	—$1,877	4.50

c. The race coefficient is the amount Black agents were paid less than white agents, on average, after differences in education and experience (the JUNIPER variables) were equalized. The t-ratio measures the statistical significance of the study. The t-ratios indicate that the probability of any of the above disparities happening by chance is less than one in a thousand; thus, the study is statistically significant at the .001 level.

d. Because Title VII is applicable to the DEA only for post-1972 discrimination, Plaintiff performed regression analyses for new hires after 1972. The results of these analyses are, with respect to race:

DATE	RACE COEFFICIENT	T-RATIO
1/1/75	—$ 378	.84
1/1/76	—$1,864	2.54
1/1/77	—$1,119	3.18
1/1/78	—$ 886	2.07
10/1/78	—$1,026	2.30

The salary differentials are statistically significant at or below the .05 level for every year save 1975.

e. The statistics in subparagraph (d) tend to downplay the effects of discrimination at DEA because almost half the agents in the 1975 analyses were hired in 1974, and the most serious promotional problems are encountered in the middle and upper grades.

f. Defendants claim that Plaintiffs' statistical evidence is flawed because the studies failed to include certain variables that would necessarily affect the analyses' outcome, to wit: (a) pre-1972 discrimination, (b) inflation, and (c) DEA's promotion criteria. If any or all of these

factors has a high corrolation to post 1972 race discrimination,[1] and should have been included in the analyses,[2] their omission would flaw the studies.

g. It has been neither admitted nor proven that Defendants discriminated against Black agents prior to 1972.

h. Qualifying the effect of pre-1972 discrimination for the purposes of a regression analysis is extremely difficult, and Defendants have not demonstrated any plausible way of differentiating between post 1972 discrimination and the effects of pre-1972 discrimination. It is clear, however, that pre-1972 discrimination might affect the subparagraph (b) statistics.[3]

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[1] For example, there is a high correlation between Smokey the Bear advertisements in the New York City subways and the lack of forest fires in New York City. A regression analysis depicting this high correlation would be flawed if it excluded the fact that there are no forests in New York City, a variable that has a high correlation to forest fires.

[2] Plaintiffs cannot be expected to include all possible variables in their regression analyses. Rather, only those variables that are both objective in nature and quantifiable need be included. Whether Plaintiff should have attempted to qualify and include pre-1972 discrimination, in light of the absence of an admission by Defendants that such discrimination took place, is a legal question dealt with *infra*.

[3] Depending on DEA's response to perceived pre-1972 discrimination, said discrimination might have three possible effects on the subparagraph (b) statistics, namely (1) the showing of post-1972 discrimination could be artifically accentuated because it would include pre-1972 discrimination, (2) the showing could be attenuated by an affirmative action taken by DEA to rectify pre-1972 discrimination, and (3) the showing might actually downplay post-1972 discrimination because any affirmative action by DEA was overresponsive to the pre-1972 discrimination. No evidence was presented by Defendants indicating that one of the three possibilities was more probable than any of the others.

i. The statistics in subparagraph (d) reflect that while pre-1972 discrimination may have affected the statistics in subparagraph (b), post 1972 discrimination largely contributed to those statistics.

j. Inflation could have a multiplier effect on Plaintiffs' statistics. Unless pre-1972 discrimination is assumed, however, the effects of inflation would be borne equally by all DEA agents, and inflation would be irrelevant to Plaintiffs' regression analyses.

k. Ordinarily, an employer's promotion criteria should be considered in regression analyses used to explain disparities in salary. Unless those promotion criteria are objective and quantifiable (such as experience and education) they cannot and should not be factored into regression analyses. With the exception of the promotion criteria included in Plaintiffs' analyses, DEA's promotion standards are subjective in nature. As such, they were correctly omitted from Plaintiffs' studies.

l. Defendants also contend that Plaintiffs' regression analyses do not explain the salary disparities, and this is borne out by the "R^2" values given those analyses. The analyses in subparagraph (b) have "R^2" values of .42 to .52. The studies in subparagraph (d) have R^2 values of .21 to .37.

m. R^2 values quantify the proportion of the total variance in the dependent variable that is associated with variations in the independent variable. They thus indicate the relative importance of the race variable in Plaintiffs' studies. According to the R^2 values attached to the two studies, race accounted for 42% to 52% of the salary disparities in the subparagraph (b) analyses, and for 21% to 37% of the salary disparities in the subparagraph (d) studies.

n. R^2 values do not replace levels of statistical significance. In the instant case, they merely indicate that other variables may also be important in explaining the salary disparities. The R^2 values of the analyses are not

so low as to adversely affect the veracity of Plaintiffs' studies.

8. Defendants presented a statistical study, called "cohort analysis" to rebut Plaintiffs' allegations of salary disparity. Cohort analysis first divides the workforce into groups of agents based on the year said agents joined the DEA and the GS grade they received upon entry. Average salaries of Black and White agents were then compared within each group. No comparison was made between agents whose grade-at-entry or entry year were different. The results of this analysis may be summarized as follows:

a. Statistical tests were performed on each of the 15 groups of cohorts. For four of these groups, Defendants found a statistical significant level of discrimination. Those four groups were then broken down into groups of subcohorts on the basis of entry grade and step and by status as a new hire or transfer. Defendants found a statistically significant level of discrimination in two of the four subcohort groups. Defendants reviewed the files of the fourteen Black agents in the two groups, finding that three of those agents had been improperly classified. DEA upgraded those agents. After the upgrading, the salary disparities were no longer found to be statistically significant.

b. Cohort analysis is an untried method of statistical study, unsupported in any published statistical work or judicial decision.

c. The rationale for the use of cohort analysis is that it purportedly accounts for pre-1972 discrimination and inflation. Defendants fail to show how cohort analysis accounted for these variables. Indeed, they failed to prove the existence of pre-1972 discrimination.

d. Cohort analysis cannot and does not take into account the agents' individual qualifications (such as education and experience). Agents who entered at the same grade and in the same year were treated as if they had

equal qualifications. This undermines the probative value of Defendants' study.

e. An agency's grade at entry does not figure into the promotion process. Moreover, all will be seen *infra*, Plaintiffs' statistical evidence indicates DEA discriminated against agents in ascertaining the initial grade at entry. Inclusion of grade at entry as a variable in the cohort analysis significantly undermines the study's probative value.

f. The 1973 entry year group (80% of all agents) contains agents who were BNDD agents prior to 1973 and remained DEA agents after 1973. Those agents had different starting years and grades. Use of these agents as one cohort group is inconsistent with the theory underlying cohort analysis.

g. Only two cohorts groups (1973 and 1974) contained more than 31 agents. Comparison of the October 1978 salaries of the 1973 group reflects a disparity that is statistically significant at the .01 level; comparison of the October 1978 salaries of the 1974 group reflects a disparity that is statistically significant at the .002 level.

h. The size of a sample affects the statistical significance of a study. The smaller the sample is, the greater the disparity has to be before it can be considered statistically significant. The disparities in the remaining groups are statistically insignificant primarily because of the small sample size.

i. Cohort analysis did not account for agents who left the DEA prior to October 1978. Moreover, 163 agents (27 of whom are Black) were inexplicably omitted from the study.

j. As the foregoing facts indicate, the cohort analysis is too flawed to be accorded significant probative value.

9. Plaintiffs performed regression analyses to test the legitimacy of disparities in grade at entry, using only those variables in the Department of Justice's JUNIPER system. The results of these analyses may be summarized as follows:

a. Blacks were 16% less likely than whites to receive GS-9 (as opposed to GS-7) positions. This is statistically significant at the .05 level. Blacks have been less likely than whites to be hired above the GS-9 level, and this is statistically significant at the .05 level. For new hires (post 1972) Blacks were 12% less likely than whites to be hired at GS-9, as opposed to GS-7, and this is statistically significant at the .01 level.

b. Defendants offered four criticisms of Plaintiffs' study, to wit: (1) the regressions used a dichotomous dependent, (2) Plaintiffs' expert did not know the job qualifications for the various positions, (3) Plaintiffs used an incomplete sample for the analysis that contained those hired prior to 1972, and (4) the analyses that included those hired prior to 1972 also included transfers.

c. Defendants' criticism of the use of a dichotomous dependent is without merit. Use of a dichotomous dependent is appropriate where only two outcomes are possible. Since only two outcomes were possible (will the agent be hired at GS-7 or GS-9) its use was appropriate in the instant context.

d. DEA's job qualifications have been delineated *supra* at 3. With the exception of education and experience, quantifying the degree that an individual has achieved these qualifications is impossible because the qualifications are all subjective in nature. Plaintiffs' experts' unfamiliarity with the qualifications is irrelevant because their lack of knowledge did not affect the results of the analyses.

e. Defendants' claim that the analyses dealing with those hired prior to 1972 is flawed because only 483 agents were included in the study. Defendants, however, do not attack the randomness of Plaintiffs' sample. It is evident that the size of the sample used in a regression analyses affects the analysis' statistical significance. Since these analyses were statistically significant, Defendants' contentions are unwarranted.

f. Finally, Defendants claim that the probative value of these analyses is undermined because transferees were included. Transferees, regardless of their qualifications, receive as their entry grade the grade they had at other agencies. Since the probability of the transferee's appointment is 100%, a probability study (such as the regression analyses in the instant case) is flawed by their inclusion.[4] The degree that this flaw impacts on the probative value of the studies is not great, however, because the most telling study involves only new hires. Transferees were not included in this analysis, and it is statistically significant at the .01 level.

10. Defendants presented statistical evidence to rebut claims of discrimination in grade at entry. Defendants evidence was a chi-square test, which found that discrimination in grade at entry was statistically significant at the .117 level. Thus, Defendants' expert concluded that there was no discrimination in grade at entry. A chi-squared testis two tailed rather than one tailed. It therefore addresses the question "What is the likelihood of finding a disparity which favors Black *or* White hires," rather than the one tailed question "What is the likelihood of finding a disparity favoring White hires?" Plaintiffs analyses are one tailed. In discrimination cases of this kind, where only a positive disparity is of interest, the one tailed test is superior.[5] This Court must conclude

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[4] It is unclear what effect the inclusion of transferees had on Plaintiffs' analyses. If the other government agencies did not discriminate in hiring, the exclusion of transferees might serve to increase the probabilities found by Plaintiffs. If the other government agencies discriminated more than Defendants did, the converse would be true. Assuming an equal degree of discrimination, the exclusion of transferees would probably not alter the results of Plaintiffs' analyses.

[5] All other factors being equal, a one tailed test will have a level of statistical significance half that of a two tailed test. This may explain, for the most part, the differences in sta-

that the statistical evidence supports Plaintiffs' contention that new hires were discriminated against in grade at entry.

11. Plaintiffs presented evidence indicating that a higher portion of Blacks than whites have been hired pursuant to Schedule A. The Defendants presented evidence explaining that this disparity was a result of DEA's use of Schedule A for conditional employment, and that the disparity has decreased over the years because DEA has changed its policy. Plaintiffs made no showing that hiring pursuant to Schedule A was discriminatory, nor did they show that any discrimination took place when a Schedule A agent decided to convert to Civil Service appointment.

12. Plaintiffs presented statistical evidence supporting their claim that Blacks were discriminated against in work assignments. Plaintiffs rely on DEA Form 371 for the data underlying this analyses. While Form 371 is flawed, *see* pages 694-695, *supra*, it is the sole source available for the studies. Form 371 lists 16 job activities and indicates the percentage of each agent's time spent performing those activities. The information was stratified according to race and grade, and the mean percentage of time that agents devoted to each of those tasks became the subject of regression analyses. The results of these studies indicate that Black agents performed different functions at DEA than did white agents.[6] As will be

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tistical significance between Plaintiffs' and Defendants' studies.

[6] Plaintiffs' studies indicate a disparity in time spent performing

a. undercover work

	GS-9 and below	GS-11	GS-13	GS-12
Blacks	16.9%	18.3%	16.9%	8.7%
Whites	12.8%	10.8%	7.6%	2.8%
difference	33 %	66 %	54 %	300 %
stat. sig.	.10	.05	.05	.05

seen *infra*, this had an adverse effect on promotions of Black special agents.

13. Defendants have not presented statistical evidence to rebut Plaintiffs' claims of discrimination in work assignment. Rather, Defendants contend that Plaintiffs' statistics are not probative because Plaintiffs' experts did not know who performed the work assignments or whether those assignments were carried out. Defendants' criticisms do not attenuate the value of Plaintiffs' statistics. This Court need not evaluate the knowledge of Plaintiffs' expert. Rather, it must scrutinize the regression analyses themselves. The analyses are based on an obviously unbiased source (Defendants' Form 371), and it is clear that those forms primarily reflect assignments made by supervisors.

14. Plaintiffs' claim that Black agents have been discriminated against in supervisory evaluations. Plaintiffs' allegation is borne out upon scrutiny of the Form 371, which contains the evaluations. Plaintiffs' regression analyses indicate that, for agents at the GS-11 level and above, the differences in supervisory evaluations were statistically significant at between .05 and .10. Defendants presented no evidence rebutting Plaintiffs' findings;

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b. undercover and street work

Blacks	52%	51.3%	48.1%	28.7%
Whites	49%	38.8%	33.7%	20.1%
difference	6%	32 %	42 %	42 %
stat. sig.	none	.05		.05 (GS-12 and GS-13 combined)

c. specialized duties

Blacks	12.5%	14.8%	18.3%	15.8%
Whites	15.3%	20.1%	27.3%	26.4%
difference	22 %	36 %	49 %	67 %
stat. sig.	none	.05		.05 (GS-12 and GS-13 combined)

d. supervisory duties

Blacks	8%
Whites	16%
difference	200%
stat. sig.	.05

indeed, Defendants have not criticized any aspect of these analyses.

15. Plaintiffs allege that DEA has discriminated against them in the imposition of discipline. The imposition of discipline at DEA is left to the discretion of supervisors; there is little guidance given at DEA in deciding when to take disciplinary action or what standards to impose, and there are no guidelines for the selection of a penalty. Plaintiffs performed regression analyses, based on statistics furnished by Defendants' experts, on both the incidence of disciplinary action and the severity of the reprimand. These analyses may be summarized as follows:

a. While Blacks constitute 6.7% of the special agent workforce, 13.3% of the disciplinary actions were brought against Black agents. This disparity is statistically significant at the .0001 level. On a year-to-year basis, the disparity is statistically significant at .01 or .02.[7]

b. The three severest punishments are removal, demotion, and suspension. Blacks were 25% of those disciplined by removal or demotion, although they were only 13.3% of those disciplined. This difference is statistically significant at the .10 level. Blacks were 18.7% of those disciplined by removal, demotion, or suspension. This difference is statistically significant at the .05 level.

c. Defendants' claim that these analyses are flawed because the majority of all disciplinary actions result from complaints outside the DEA. The contention is without merit. The issue presented here is not whether the initiation of the disciplinary process is *per se* discriminatory. Rather, the issue is whether the system, as effectuated, discriminates against Black agents. DEA chose to pursue all complaints against agents made by

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[7] The difference in statistical significance is due to the difference in sample size between a year-to-year analysis and the total amount of disciplinary actions brought after 1972.

bona fide individuals, and DEA determined which complaints warranted disciplinary action. Plaintiffs' statistics, which are unrefuted, indicate that there is only a one in ten thousand chance that the degree to which Black agents are subject to disciplinary action happened randomly.

d. Defendants also claim that Messrs. Segar and Davis were included twice in Plaintiffs' severity study. Defendants then used a chi-square test,[8] and determined that the statistical significance of any disparity in the severity of discpilinary action was between .10 and .20.[9] Defendants' expert omitted all cases of alleged multiple offenses, however, where most of the more serious sanctions were imposed. While Defendants' statistical evidence is thus flawed, it still serves to support Plaintiffs' contention that Blacks are disciplined more often and more severely than Whites.

16. Plaintiffs' experts conducted a study of the incidence of promotions, defined as the proportion of agents who began a calendar year at a given grade who were promoted during the next year to the next highest grade. The study covered all promotions for years 1975 through 1978, and the results may be summarized as follows:

a. Promotions were almost automatic from GS-7 to GS-9 and from GS-9 to GS-11. The promotion rate from GS-11 to GS-12 was 70% for Blacks and 82% for whites. This is statistically significant at the .01 level. The promotion rate for GS-12 to GS-13 was 6% for Blacks and 8% for whites. This difference is not statistically significant. The promotion rate from GS-13 to GS-14 was 3% for Blacks and 7% for whites. This is statistically significant at the .10 level. Differences in promotions were statistically insignificant for GS-14 to GS-15 and GS-15 though GS-18.

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[8] As was noted in paragraph 12, *supra,* a chi-square test is inferior to Plaintiffs' one-tailed test.

[9] *See* footnote 5, *supra.*

b. Most of the GS-11 to GS-12 promotions are non-competitive, and promotion is based on the recommendation of the agent's supervisor. GS-11 is the first grade where supervisors' ratings for Black agents were substantially lower than ratings for White agents.

c. Defendants attack Plaintiffs' study of three grounds, viz. (1) only from GS-11 to GS-12 was the study statistically significant, (2) Plaintiffs did not ascertain what agents applied for promotions, and (3) the regression analyses did not consider the quality of agents' past performance.

d. Plaintiffs' experts consider a .10 level (10% possibility of chance) to be statistically significant. Defendants experts stated that anything above the .05 level was statistically insignificant. The probative value of a study is affected by that study's statistical significance. Thus, this Court accords minimal value to Plaintiffs' promotions analysis for promotions from GS-13 to GS-14.

e. Promotions from GS-11 to GS-12 are primarily non-competitive. Applications for those positions are therefore not required. For competitive positions, Plaintiffs presented evidence, which was undisputed, that Black and white agents applied for positions in equal numbers. Defendants' second contention is therefore without merit.

f. Defendants' allegation that Plaintiffs' studies did not consider work qualifications is unfounded. Their analyses contained all the data in the JUNIPER system. All other promotions criteria is subjective, and therefore was correctly excluded from Plaintiffs' analyses. A clear disparity in promotions from GS-11 to GS-12 exists at DEA.

g. Defendants' expert performed an overall incidence of promotions study, and found no disparate impact. Defendants' study included promotions data from all grades. Thus, it included promotions from GS-7 to GS-9 and from GS-9 to GS-11, which are granted almost as a matter of course. Defendants' study is therefore not probative.

17. Plaintiffs also presented statistical evidence to prove that Blacks were discriminated against in Career Board appointments. Their study included all vacancy anouncements that were filled competitively by the Career Board, excluding those filled by lateral transfer or vacancy. Blacks and whites applied in equal numbers for Career Board appointments, and whites received a greater number of appointments. Plaintiffs' study is not probative, however, because it fails to exclude job positions for which no Blacks applied. If those positions are excluded, any disparity shown is statistically insignificant.

C. Non-Statistical Evidence

Initial Grade Assignments and Schedule A Appointments

18. In addition to the statistical evidence from both Plaintiffs' and Defendants' expert witnesses there was specific testimony relating to the allegations of Lionel Stewart, John Sutton, and Samuel Blackburn regarding the grade at which they were hired;

a. Lionel Stewart, who came to DEA from a responsible position in military drug enforcement and who had extensive experience in drug enforcement, enter DEA at a Schedule A GS-9 and contended that at the same time two comparably qualified Whites entered at GS-11. Significantly he did not have Civil Service status at the time he applied to DEA and thus could not be equated with two agents who came to DEA, from AFT and ONI presumably with Civil Service status.

b. John Sutton entered DEA as a GS-7. He contended that at the time he joined BNDD, he met the minimum requirements for a GS-9 position. He considered requestting that he be hired at the GS-9 level, but did not do so because an agent named Drueger instructed him to put down the lowest level that he would accept as the GS-7 level. Sutton claimed that other agents who were White were hired above the GS-7 level. Although he did not

have a mid-level rating, he testified that he knew that a number of the other persons hired at the GS-9 level also were not rated at mid-level. No evidence was presented during trial as to the previous experience or qualifications of the other individuals whom he alleged were hired at the GS-9 level. Sutton noted that upon being hired he discussed the possibility of being promoted to the GS-9 level with the Personnel Director, Mr. Benston. According to Sutton, Benston instructed him to take the mid-level examination, and if he passed he would be qualified for GS-9 and would be promoted after being on the job six months. Sutton took the mid-level but was not promoted after six months. He was promoted to GS-9 approximately one year after coming on the job. Sutton recalled that the other agents who were hired at GS-7 when he was were promoted to GS-9 more quickly. He named one agent who was promoted from GS-7 to GS-8 in six months, but again there was no evidence as to the qualifications of that agent. Defendants' Sutton Exhibit A was a memorandum written in October, 1969, by Jessie M. Gallegos, then DEA's Recruiting and Placement Officer. Also on the memorandum was a handwritten note signed by Mr. Benston. The memorandum was prepared by Mr. Gallegos and signed by Mr. Benston during the time that Sutton was at basic training school. The memorandum dealt with the issue of whether Sutton qualified for a GS-9 position. According to Mr. Gallegos, in order to qualify for the GS-9, Sutton would have had to have spent at least 50% of his time at the Compton Police Department in criminal investigations requiring the use of investigative methods and techniques such as surveillance and assuming an undercover role. Sutton felt that, based upon his experience working with the Compton Police Department, he met this requirement. He indicated that Mr. Benston told him he qualified for a GS-9 position. The memorandum, however, reflects that Benston discussed the possibility of eligibility for a GS-9 with Sutton, that Sutton told him that he believed he was qualified

and that Benston had advised Sutton to take the mid-level. Benston's contemporaneous memorandum did not imply that Benston stated that Sutton was qualified for a GS-9 position. Sutton admitted that it was Mr. Benston who brought the question of his qualifications for GS-9 to his attention, and not vice versa. Sutton conceded that he was aware that his promotion to GS-9 was contingent upon doing well on the mid-level exam, and that the Civil Service Commission had to be convinced that he met the requirements. He noted that Mr. Benston did not give him any indication that there would be a problem, although Benston did not tell him that he could make him a GS-9. In addition to the contemporaneous memorandum (Defendants' Sutton Exhibit A) defendants offered the testimony of Joseph Krueger. Mr. Krueger denied having told Sutton to accept a GS-7 position even though he was qualified for a GS-9. It was Krueger's recollection that Sutton's prior experience did not qualify him for the GS-9 position. Consistent with this, Sutton testified that he believed that he did not work undercover on any drug violations while employed by the Compton Police Department.

c. Samuel Blackburn was hired by DEA under Schedule A at the GS-9, step 1, level, in April, 1974. Before joining DEA he was employed with the Metropolitan Police Department in Washington, D.C., where his duties included undercover work and narcotics work. He claimed that he was subject to discrimination because DEA tried to hire him at the GS-7, step 1, even when he believed himself qualified for entry at the GS-9, step 1, level. According to Blackburn, sometime between his panel interview and the job offer, DEA's Personnel Director, Mr. Ballard, directed him to submit his qualifications to the Civil Service Commission so that he would be able to enter on the mid-level. Blackburn testified that he applied to the Civil Service Commission through the mid-level examination and received what he thought to be a rating which qualified him to enter as an agent at the

GS-9, step 1, level. After receiving an offer of employment at the GS-7, step 1, level, dated April 24, 1974, he contacted the Baltimore Regional Office and informed them that he had applied for a mid-level status and that he had received a communication from the Civil Service Commission noting his GS-9, step 1, rating. Blackburn stated that a Mr. Mitch, with whom he spoke, became rude and told him to take the job as a GS-7, step 1, or to forget about it. Blackburn subsequently spoke to the personnel office at Headquarters and was informed that DEA would offer him a position at the GS-9, step 1, level. Plaintiffs' Exhibit 33 confirmed that, on April 25, 1974, Blackburn was offered a position at the GS-9, step 1, level. Blackburn admitted that upon receipt of the April 24, 1974, letter, he checked the box indicating that he accepted DEA's offer of employment at the GS-7, step 1, level, and that he signed the letter and dated it April 24, 1974. Blackburn noted that he received a letter from Mr. Ballard on April 25, 1974, stating that DEA would offer him a position at the GS-9, step 1, level and that, therefore, it took only one day to straighten out the confusion between his entry at grade 7 versus grade 9.

19. The testimony regarding Schedule A Appointments may be summarized as follows.

a. Blackburn also contended that he was discriminated against in being hired under Schedule A as opposed to career conditional. Blackburn testified that he believed the letter of April 24, 1974, from Mr. Ballard meant that he was on the Civil Service register and that DEA had received his mid-level qualification rating. Blackburn believed that his Schedule A appointment was temporary and that he would be converted to career conditional status as soon as DEA could take his name from the Civil Service register. Blackburn testified that he was led to believe that this would take only one to three weeks. Blackburn contended that he was misled as to the nature of Schedule A status. He testified that when he was hired under Schedule A, no one at DEA explained the limita-

tions of Schedule A insofar as promotions and job security. Blackburn noted that he was told during his job interview that he would have the same opportunity to progress through DEA as he had with the police department. He subsequently found that Schedule A employees could not hold supervisory positions nor progress beyond the GS-13 level. Because he was not made aware of these limitations when he was hired, Blackburn felt that DEA had lied to him about his employment opportunity.

b. Blackburn pointed out that he has spoken to other Schedule A agents in New York who were also unaware of the implications of being a Schedule A employee. Blackburn spoke to Mr. Joseph LaRocco, the Personnel Officer in New York, about the details of Schedule A. According to Blackburn, LaRocco told him that in order to be converted he would have to get on the Civil Service register. LaRocco told him he would have to do this by reapplying through the mid-level exam, but that the New York register had been closed for a number of years and there was nothing he could do until it reopened. Blackburn subsequently filed a complaint of discrimination against DEA regarding the Schedule A matter. His complaint was denied by DEA's EEO Office and then subsequently denied by the Department of Justice.

c. Blackburn further testified that his understanding that having a mid-level rating automatically qualified him for a career conditional position was based on conversations with his friends. He admitted that he accepted DEA's job offer knowing that he was being hired as a Schedule A appointee, and that the letter offering him employment stated that he would be converted to career conditional status when his name could be obtained from the Federal Civil Service register. Blackburn further admitted that he was employed by DEA for three years before he went to Mr. LaRocco to ask about being converted from Schedule A. He noted that LaRocco encouraged him to try to get on the register and that LaRocco wrote to him twice, telling him that the register might

be opening and that he should apply to get on. Blackburn also admitted that he was not aware that 23 New York agents were also awaiting conversion and that nine of them were Black, seven Hispanic, and seven were white. Finally, Blackburn conceded that of the 12 persons who were converted at the same time as him, ten were minorities.

d. Defendants called Joseph C. LaRocco, the New York Regional Personnel Officer, who testified that there was nothing in Blackburn's personnel filed to indicate that he had any kind of competitive status or Civil Service listing, and that, therefore, Blackburn could only have been hired on Schedule A. LaRocco noted that an explanation of Schedule A is attached to every Personnel Action Form (Form 50) received by the agent. Since Blackburn had received 12 personnel actions up to the time he had the detailed discussion with LaRocco regarding Schedule A in April or May of 1977, Blackburn had had on opportunity to see an explanation of Schedule A at least 12 times. LaRocco further testified that Blackburn's mid-level examination rating in itself did not imply that Blackburn could be hired as a career conditional employee because one must have competitive status or a Civil Service listing to be hired as career conditional. LaRocco testified that Blackburn's name did not appear on the Civil Service certificate until February, 1979, and that Blackburn was converted that same month.

20. Until hiring authority was transferred to Headquarters, the regional directors recommended applicants to Headquarters and also recommended the GS level at which they should be hired. Directives from Headquarters requested the field offices to hire at the GS-7 level if at all possible because of severe budgetary restraints. Additionally, regional directors were limited by the Civil Service qualification requirements. No applicant could be hired at either GS-7 or GS-9 unless the applicant met the Civil Service qualifications for the particular grade level. Applicants on a Civil Service GS-9 certificate could not

be hired as a GS-7 unless under Schedule A, and Schedule A was rarely used to hire an applicant already on the Civil Service register.

Work Assignments

21. Discretionary assignment decisions made or approved by supervisors largely influence the kinds and amount of work agents perform. Those assignments decisions, rather than voluntary choices by agents, principally determine the work of the agents. At the office level, Regional Directors, SAICs and RAICs have authority and responsibility to assign agents to groups. At the group level, group supervisors have the authority and responsibility to make individual job assignments for the agents under their direct supervision. Race is considered in the assignment of agents to undercover work. This practice has produced a pattern in which Blacks spend significantly more time in undercover and related work and less in general administrative and supervisory work than Whites and impacts adversely on the ability of Black agents to develop skills in all areas of the job of special agent.

22. The regulation of Black agents to particular types of job assignments is historical with Defendants. A 1971 decision on the complaint of Black agent Benjamin Metz so concluded. That decision further concluded that the failure of responsible agency officials to correct this job assignment problem made them responsible for depriving Black agents of opportunities that were career beneficial. The 1974 Department of Justice report on discrimination at DEA concluded that "minorities are used to a greater extent than non-minorities in undercover work." These earlier practices reflect a persistent agency attitude that overtly regarded Black agents as a different kind of agent from white agents; that the proper role for Blacks is in undercover working for White agents and dealing primarily with Black suspects. Nothing in the nature of the

job of a special agent justifies such a differential in work assignments as between White and Black agents.

23. Disproportionate regular or Temporary Duty (TDY) Assignment to undercover work adversely affects Black agents in that undercover work (a) exposes all agents to dangers and hardships, including life threatening situations that are considerably lessened in other work assignments, (b) precludes obtaining the breadth of experience that is a critical consideration for promotion to supervisory positions, (c) teaches a limited range of skills, and (d) impairs an agent's ability to remain current with necessary administrative duties. Such administrative and supervisory experience as is gained in undercover work cannot be equated in kind or quality with that entailed in other job assignments.

Supervisory Evaluation and Promotion

24. All agents are periodically evaluated by their supervisors on a set of designated dimensions designed to reflect job performance. The results are reported on a standard supervisors' evaluation form, DEA Form 371. These evaluation forms are completed at least annually and play an important role in decisions whether to promote an agent. The supervisor completes three portions of the form. In the first part, the supervisor indicates the amount of time the agent had devoted during the year to various agent activities such as informant development, undercover operations, conspiracy investigations, supervisory duties, and giving direction as case agent. In the Evaluation of Performance section of the 371 form, the supervisor gives a general appraisal of the agent's work and evaluates the agent on 16 specific elements of performance. In the third part of the form the supervisor rates the agent's potential. The form directs the supervisor to "appraise the agent's overall growth capacity and evidence of ability to assume greater responsibility IN RELATION TO OTHER AGENTS of

his or her grade level." The possible ratings are lower 25 percent, middle 50 percent, and lower ⅔ or upper ⅓ of top 25 percent. The form also provides for the supervisor to rate the agent and make recommendations regarding his further assignments and training.

25. The agent is afforded an opportunity to review and comment on the evaluation in a subsequent part, and is required to sign it. The evaluation form is also reviewed by the second level supervisor. There is a space for him to comment on the relationship between the agent and his supervisor, the extent to which the agent's performance was directly observed by his supervisor, and the fairness and completeness of the evaluation. He may also make comments on the agent's performance and potential.

26. Employment decisions should be made on the basis of accurate and complete information about the nature of the job involved. Information about the components of a job, and the abilities needed to perform the job successfully, is best obtained through a job analysis. A job analysis is a systematic, detailed study of the content of a job such that one can develop an accurate description of what the job entails, the conditions under which the job is performed, and the knowledge, skills, and abilities needed to perform that job. Its purpose is to develop sufficient information from which one can reach certain conclusions about the job and determine the minimum qualifications that might be needed, the appropriate performance standards that should be set, and the appropriate training program that might be established for the job, and other relevant and important considerations.

27. Before an employer uses a selection procedure, it should determine the validity of the selection procedure by performing a validation study. A job analysis is an essential component of a validation study. A selection measure is valid if it is positively related to job performance. DEA has not validated the use of its supervisors' evaluation form, and has undertaken no job analysis or validation studies. Absent such studies, there is

no way to determine whether the supervisors' evaluation form is at all related to job performance.

28. DEA provides its supervisors with no written instructions on how to evaluate an agent's performance in each of the rating categories on the form. Although at Supervisory Training School a few hours of instruction are offered on how to complete the supervisors' evaluation form, the Personnel Office conducts no follow-up studies to ensure that supervisors are interpreting the categories and evaluating agents' performance consistently. When untutored supervisors are confronted with rating categories that are not tied to specific behaviors, they are, as Outtz testified, "likely to err in terms of making judgments about performance" in a racially discriminatory manner. Use of an evaluation system such as DEA's where almost all group supervisors are White, is very likely to result in Black agents receiving lower ratings than their White counterparts.

29. The testimony of Black special agents confirms Plaintiffs' statistical proof that DEA's supervisors' evaluation form has an adverse impact on Black special agents. For example, in 1976, Special Agent Blackburn's *Black* group supervisor rated him in the upper ⅓ of the top 25 percent in the evaluation of potential category. In the specific performance categories, Agent Blackburn was rated high in Initiative, Ambition, Judgment, Forcefulness, Cooperation, and Competence. In 1977 and 1978, on the other hand, Agent Blackburn was evaluated by his *White* group supervisor, Joseph C. Braddock, and his ratings were lower in almost all areas. Indeed, in 1977 he was rated very low in the valuation of potential category (middle 50%). Moreover, he was criticized for being too ambitious, too rash in judgment, and too uncooperative with other—presumably White—agents. Black agents who do not conform to the expectations White agents and especially their White group supervisors have about them, are criticized for being too aggressive and too abrasive.

30. Supervisors tend to rate "a higher percentage and certainly more than half" of the agents in the top 25 percent in the evaluation of potential category. As a result of this "rating inflation," for all practical purposes an agent must be rated in the top 25 percent to be seriously considered for a promotion to a GS-13 or above position.

31. Because Black agents are dated systematically lower than the White agents in their groups, they complain to their group supervisors more often about their evaluations. This contributes to an unhealthy working situation in which Blacks tend to be regarded by their supervisors as too sensitive and too aggressive.

32. Group supervisors are in a position to affect substantially the kinds of work assignments and training opportunities that are available to special agents in their group. These supervisors will naturally be influenced in these matters by their evaluations of their agents' performance and potential. Because Black agents systematically have lower evaluations, the rewarding work and training assignments tend not to go to them.

33. Although Black agents usually are allowed to attend some training classes available to DEA agents, they must actively seek them out and demand that they be sent in order to receive this training. White agents, on the other hand, are more likely to be selected by their group supervisors to attend without having to indicate any interest in the class. Training has an impact on an agent's career development. The fact that Black agents are systematically related lower than Whites directly harms the employment status of Black agents.

34. Supervisors' evaluations are an important element in DEA's noncompetitive promotion system. See pages 695-696, *supra*. The numerical rating system used by the Career Board assigns 45 of the 100 possible points to performance evaluation; thus this factor has a great deal of weight in the competitive process. Racial disparities in performance evaluations contribute directly to dis-

parities in both the noncompetitive and competitive promotion systems.

Imposition of Discipline

35. The imposition of discipline in DEA is left to the discretion of individual supervisors. Any supervisor may propose disciplinary action against one of his agents. The supervisor's supervisor then reviews the proposal and decides whether disciplinary action will be taken and what sanction will be imposed. If the agent wishes to contest a disciplinary action, he may follow a grievance procedure. However, allegations of racial discrimination are excluded from that procedure and may be pursued only by filing a formal EEO complaint.

36. DEA gives its supervisors little guidance in deciding when to take disciplinary action or what standards to impose. DEA's Standard Schedule of Disciplinary Offenses defines 39 punishable offenses, some of which are extremely vague. It states an authorized range of penalties for each offense, but for most offenses the range extends from the most lenient penalty (reprimand) to the most severe (removal). Within that range, there are no objective guidelines for selection of a penalty.

37. DEA does not review the imposition of discipline to determine whether it is imposed disproportionately on Blacks. The reports on disciplinary actions sent by the regions to Headquarters do not indicate the race of the agents receiving discipline. Neither the EEO office nor the personnel office reviews the racial incidence of discipline in DEA.

38. DEA's 1979 Affirmative Action Plan recognizes that DEA employees are disciplined differently for similar offenses.

39. The cases of Plaintiffs Morris Davis and Henry Segar exemplify this pattern. Davis was removed by DEA on March 18, 1976, in a disciplinary action. He sought review of that action by the Federal Employee

Appeals Authority of the Civil Service Commission. That body ruled on May 21, 1977, that race was a factor in Davis' removal, and ordered him reinstated. The Appeals Authority concluded, after reviewing four incidents dealing with vehicle violations involving Blacks and 25 such incidents involving non-Blacks, that "[i]n view of the disposition of these other cases, and the clearly disproportionately milder disciplinary actions taken against non-Black agents . . . the difference in severity between appellant's conduct as compared to the other examples cited does not comport with the difference in severity of the punishments imposed. We find, therefore, that race was a consideration in [Morris H. Davis'] removal."

40. Plaintiff Henry Segar was removed by DEA on February 28, 1975, in a disciplinary action. He sought review on that action by the Complaint Adjudication Officer of the Department of Justice, who decided on March 28, 1978, that Segar's removal was an act of racial discrimination and of reprisal. Segar was restored to his position with DEA on June 26, 1978. The Complaint Adjudication Officer found, *inter alia*, that "the figures in the file reflecting minority employment on the Special Agent workforce in both the New York Regional Office in 1973 and 1974 are so grossly disproportionate as to raise serious concern about the employment practices regarding Special Agents in those offices . . . ."

41. To avoid any appearance on the Government's part of unfairly hindering Title VII lawsuits, the Attorney General has stated that the Government will not attempt to contest a final agency or Civil Service Commission finding of discrimination by seeking a trial *de novo* in those cases where an employee who has been successful in proving his claim before either the agency or the Commission files a civil action seeking only to expand upon the remedy proposed by such final decision. Thus, Defendants are bound in this action by the decision of the Complaint Adjudication Officer with respect to Segar.

42. The discriminatory imposition of discipline harms Black agents directly because they receive unwarranted and unjustly severe punishment. It harms them indirectly by adversely affecting their prospects of promotion, because an agent's disciplinary record is considered when he seeks promotion.

Defendant's EEO Program

43. Administrative decisions and official reports have placed the DEA on notice over the last eight years that discrimination against Black agents existed and exists within the agency. Yet the EEO office has failed to conduct the systemic studies which are the necessary first step to the detection and remediation of that discrimination. The EEO office has limited its role to responding to individual complaints, despite the fact that DEA's practices in areas such as supervisory evaluations, promotions, work assignments, and discipline has had an adverse impact on Black special agents.

44. Defendants presented the testimony of several high level DEA officials that demonstrated their concern for possible discrimination in DEA. Their approach, however, was similar to the EEO office's view that any discrimination at DEA existed solely in interpersonal contacts between special agents, their supervisors, and those with ultimate authority at DEA. By focusing on individual complaints and individual behavior, both the senior DEA officials and the EEO Office avoided the larger issue, *viz.*, the extent to which the whole DEA operation serves to discriminate against Black special agents. The perception that discrimination at DEA is primarily a problem of interpersonal dynamics necessarily precludes systemic changes essential to the elimination of race discrimination at DEA.

The 1978 Domestic Reorganization

45. The 1978 domestic reorganization was affected to provide better uniformity in policy direction and to elimi-

nate unnecessary layering. Administrator Bensinger had determined that there were too many supervisors in the field and that a problem was created because the numerous regional directors were interpreting certain policies differently and competing for resources and investigative leads.

46. Nelson Coon, the Assistant Administrator for Administration and Management, was the project officer involved in planning and carrying out the reorganization. The reorganization process was as follows: A team was set up in the spring of 1977 to look not only for reorganization possibilities but better use of manpower through the technique called "Tables of Organization." During the summer of 1977, various concepts were discussed. In May, 1977, five regional directors were brought to Headquarters to look at the first efforts of the team. Arthur Lewis, the highest ranking Black Special Agent and then Regional Director from Philadelphia, was among the five regional directors brought in. The decision process came to a head in the latter part of 1977, at which time the Administrator selected from the three or more alternatives which had been developed by the team. Between then and the Attorney General's final approval in February, 1978, there was a series of briefings held in Headquarters for senior office heads, including the Equal Employment Opportunity Director. In February, 1978, transition teams were set up to carry out the reorganization. Each of the teams had an EEO representative. The reorganization was made fully effective on October 1, 1978. During the summer of 1977, the agency consolidated the Philadelphia and Baltimore regions. Arthur Lewis was made Regional Director of the new region. When this pilot reorganization occurred in 1977, Bensinger had not contemplated that the resulting new Philadelphia Region would be abolished in the ultimate reorganization.

47. During the reorganization, consideration was given to the impact that it might have on minorities. The EEO

office prepared a paper on the status of minorities in DEA. The paper was sent to the Acting Deputy Administrator, Mr. Lewis. In addition, EEO representatives were included in the planning and implementation sessions. The EEO representatives were pleased at the final decisions on the choices for many of the top positions. Because the main concern in the reorganization was not who was going to get new jobs, but who was going to survive, the minorities did fairly well in the view of the EEO representatives. There were 26 assistant regional directors before the reorganization. This was a layer of supervision which DEA felt it could do without. Of those 26, three were Black. As a consequence of the reorganization, two of those Black assistant regional directors, Carl Jackson and Jack Peterson, were elevated in status (although lowered in grade and rank) in the organization and became the operational heads of the two largest offices—New York and Los Angeles. The third Black assistant regional director, Kenneth Cloud of Kansas City, came to Headquarters as a division chief and is the responsible officer for all of Europe and the Middle East. There was a reduction of the regional directors from 12 to five. Of the seven persons who were to lose their regional directorship, two were supergrades, John Lund in Denver and Arthur Lewis in Philadelphia. Of the other five, all of them were losing their supergrade opportunity because their jobs had previously been classified as GS-16s. They were awaiting the availability of supergrade positions. Of those five, four positions were occupied by Whites and one was vacant.

48. Arthur Lewis was the only officer in the reorganization who kept his grade and was not to be transferred geographically. The positions of Carl Jackson and Jack Peterson as special agents in charge of the two largest regions are positions which are considered supergrade or GS-16 positions. DEA has submitted proposals to the Department of Justice to raise those positions to GS-16, but to date this has not been effectuated. At the GS-14

level, a surplus of persons was created by the reorganization because some GS-14 group supervisor positions were eliminated. According to Aaron Hatcher, DEA's Black Personnel Director, Blacks were not adversely affected by the reorganization because they received equivalent or higher positions as a result. Joseph Dino and Donald Young, both Whites, were reduced in rank or status due to the reorganization. There is no evidence of any Black agent who was reduced in rank or status. With respect to Lewis' allegations regarding the impact of the reorganization on him, it is noted that (1) Lewis knew about and was personally involved in the planning and implementation of the reorganization; (2) there was never a time when he was Acting Deputy during the planning and implementation of the reorganization that he told anyone that he wanted to get back to his region; (3) when he learned that Justice had indicated they wanted to name someone from outside the agency as Deputy, he was happy to go back to Philadelphia; (4) he believed the reorganization was a sound management program which he supported totally; (5) Bensinger told him that he had submitted Lewis' name to Justice for the Deputy Administrator position; (6) he had no personal knowledge of the present status of the vacant Deputy Administrator position; (7) Lewis was not downgraded to GS-15 after the reorganization while white former regional directors were; (8) Lewis is the only GS-16 Special Agent in Charge; and (9) he has not complained formally or informally about anything that has happened to him in DEA since 1972.

49. Lewis testified that he knew of no other Black supervisors who lost their jobs in the reorganization other than himself. The reduction of five regions minimized the chances for progression and opportunity, in that it made more people at the bottom not eligible to be promoted to other grades. Accordingly, because Blacks were already behind prior to that circumstance, they will now fall farther behind because the opportunities are

not there. This reduced opportunity for group supervisory positions after the reorganization has affected all agents, but has affected Blacks differently. Lewis stated that he does not think that this was racially motivated. In fact, Lewis believed that the 1978 reorganization was sound because for the first time it developed a management program that separated program responsibility and policy responsibility. He felt that Bensinger's philosophy of management of reducing the number of regions was a sound philosophy which worked well. He agreed that the number of regions should be reduced from 12 to five, did not recommend against the reorganization to Bensinger and, in fact, supported it totally.

50. Carl Jackson, the Special Agent in Charge in New York, and Jack Peterson, the Special Agent in Charge in Los Angeles were hurt by the reorganization. Although Lewis agreed that Jackson and Peterson moved to positions of higher responsibility after the reorganization, he pointed out that those positions have less authority, in terms of grade and rank, than was indicated during the reorganization. Jackson and Peterson had not yet received their GS-16s, which Lewis understood was to happen following the reorganization. Lewis also felt that the concept of giving special agents in charge of the major offices program control in order to prepare them to be regional directors or deputy regional directors has been rejected, which has affected Jackson and Peterson.

Testimony of Black Special Agents

51. In support of the allegations of class-wide discrimination against Black special agents, Plaintiffs presented the testimony of one named Plaintiff, eight special agents, and one former Black agent trainee. This testimony may be summarized as follows:

a. The testimony was unequivocal in depicting the feelings and perceptions of the special agents that (1) they themselves were constantly discriminated against in the workplace, (2) that this discrimination was the re-

sult both of subliminal discrimination by their supervisors and systemic discrimination at DEA; and (3) that all other Black special agents suffered from both discrete acts of discrimination and systemic discrimination.

b. In some instances, the witnesses' testimony was corroborated by statistical and/or documentary evidence. For example, the testimony regarding systemic discrimination in supervisory evaluations, promotions, work assignments, and discipline lent support to the statistical and/or documentary evidence regarding those claims.

c. In other instances, the testimony supported the DEA's contentions. For example, the testimony of agent Blackburn indicated that DEA's use of Schedule A appointments was not discriminatory. Likewise, the testimony of several agents that Blacks were not given equal opportunities in training was contradicted by at least one other Black special agent, and is unsupported by the nontestimonial evidence.

d. Moreover, the allegations of specific discrimination presented by Black special agents was not corroborated by other evidence, and was substantially refuted by government witnesses. Defendants proved that the specific acts alleged did not occur because of the agent's race.

e. Defendant's proof regarding the specific acts cited by the Black DEA agents goes no farther than those acts. It does not indicate that the pervasive feeling among Black agents that DEA discriminates against them on the basis of race is either ill-conceived or irrational. Rather, the Court notes that the systemic discrimination existing at DEA provides an ample rational foundation for the perceptions of those agents. The agents' belief in the existence of race discrimination at DEA remained undaunted in the face of vigorous and highly competent cross-examination. The perceptions of the high ranking Black agents, who are respected in their field, intelligent, and trained to detect the nuances of a particular situation, are probative of the existence of race discrimination at DEA, and support the statistical and documentary evidence.

CONCLUSIONS OF LAW

A. Legal Background

1. This Court has jurisdiction over this litigation pursuant to 42 U.S.C. §§ 2000e-5(f)(3) and 2000-16. *Chandler v. Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976).

2. The proscription against employment discrimination on the basis of race in Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, applies to Federal agencies. *Berrio v. EEOC*, 18 FEP 1213 (D.D.C. 1979).

3. What establishes a *prima facie* case varies from case to case and is not a rigid formula to be applied without variation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n. 13, 93 S.Ct. 1817, 1824 n. 13, 36 L.Ed.2d 668 (1973); *Teamsters v. U.S.*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977).

4. Generally, there are two types of Title VII cases, those which involve "disparate treatment" of individuals and those which involve "disparate impact" on classes of people. *Teamsters v. U.S.*, 431 U.S. at 335 n. 15, 97 S.Ct. at 1855 n. 15. In either type of Title VII litigation, Plaintiff must initially establish a *prima facie* case. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802, 93 S.Ct. at 1824; *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977).

5. The burden of proof in Title VII litigation always remains on the Plaintiff. After the establishment of a *prima facie* case, however, the burden of persuasion shifts to the employer. This burden requires the Defendant to "articulate some legitimate, nondiscriminatory reason." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978). If the Defendant meets the rebuttal burden, the Plaintiff has an opportunity to show that the apparently legitimate

reason is, in fact, a pretext. *Kinsey v. First Regional Sec., Inc.*, 557 F.2d 830, 836 (D.C.Cir. 1977).

6. Disparate impact involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Teamsters v. U.S.*, 431 U.S. at 336 n. 15, 97 S.Ct. at 1854-55 n. 15. To prove a *prima facie* case under a disparate impact theory, a plaintiff need only show that the challenged practice or procedure, although facially neutral, has a discriminatory effect. *Dothard v. Rawlinson*, 433 U.S. at 329, 97 S.Ct. at 2726-27.

7. Disparate treatment exists when an employer treats some individuals less favorably than others because of their race, color, religion, sex, or national origin. *Teamsters v. U.S.*, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854-55 n. 15. Proof of disparate treatment differs from proof of disparate impact in that it requires a showing that the employer acted with a discriminatory motive or intent. *Id.* Discriminatory motive may however, be inferred "from the mere fact of differences in treatment." *Id.*

8. Statistical evidence alone is sufficient to establish a *prima facie* case of discrimination. *Hazelwood School District v. U.S.*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741-42, 53 L.Ed.2d 768 (1977); *Davis v. Califano*, 613 F.2d 957, 962-965 (D.C.Cir. 1979). Since statistical disparities may suffice to establish a discriminatory motive, *a fortiori* they are sufficient to establish a *prima facie* case when a showing of motive is not required.

9. Statistical evidence may be rebutted in two ways. A party may show that his opponent's statistics are either "inaccurate or insignificant." *Teamsters v. U.S.*, 431 U.S. at 360, 97 S.Ct. at 1867. Statistical proof such as regression analyses and cohort analyses may be deemed insignificant if relevant factors are excluded from the analyses or obfuscating variables are included. The burden is on the opposing party to clearly rebut statistical evidence; hypotheses or conjecture will not suffice.

See Pennsylvania v. Local 542, Operating Engineers, 469 F.Supp. 329, 370-375 (E.D.Pa. 1978). When a plaintiff submits accurate statistical data, and a defendant alleges that relevant variables are excluded, defendant may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant, in his rebuttal presentation, must either rework plaintiff's statistics incorporating the omitted factors or present other proof undermining plaintiff's claims. *Davis v. Califano*, 613 F.2d at 964.

B. Salaries

10. Plaintiffs have shown gross disparities between the salaries of comparably qualified Black and White agents at DEA. These disparities are evident in the regression analyses involving all agents for the period 1975-1978, and new hires for the period 1976-1978. Because of the significant level of the disparities shown, Plaintiffs have proven a *prima facie* case of discrimination in salary. Defendants have attempted to rebut this proof through the presentation of cohort analysis. The cohort analysis was irreparably flawed, however, and is devoid of probative value. Thus, Defendants' presentation of statistical evidence did not show that Plaintiffs' evidence was either inaccurate or insignificant. *Teamsters v. U.S.*, 431 U.S. at 360, 97 S.Ct. at 1867.

11. Defendants alleged that Plaintiffs statistics were insignificant because relevant factors (e.g. pre-1972 discrimination, inflation, and specific types of prior work experience) were omitted from the regression analyses. Defendants' criticisms were never empirically based, however, although Defendants had the capability of testing their various objections. The fact that Defendants choose not to test their hypotheses leaves their criticisms speculative and incapable of rebutting Plaintiffs' statistical showing. *Pennsylvania v. Local 542 Operating Engineers*, 469 F.Supp. at 370-375.

12. Finally, Defendants contend that DEA's promotion criteria must be factored into a regression analysis if it is to have significant probative value. Because the promotion criteria are subjective, they are themselves subject to employer discrimination. Thus, it would be improper for Plaintiffs to include promotion criteria in their regression analyses. *See James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 345-47 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978).

13. Defendants have neither rebutted Plaintiffs' proof nor shown any justification for the salary disparities between comparably qualified Black and White agents at DEA. Accordingly, this Court concludes that Defendants have discriminated against Black agents as a class with respect to salary in violation of Title VII.

C. Grade at Entry

14. When decisions on grade at entry are made in a subjective fashion by numerous officials, without objective standards guiding the exercise of discretion, there is a great potential for abuse. Plaintiffs have shown by statistical evidence that DEA's subjective, regionalized method of decisionmaking on grade at entry has had disparate impact on Black agents, and have thus proven a *prima facie* case of discrimination.

15. Defendants attempted to rebut Plaintiffs statistics by showing that they were both inaccurate and insignificant. Defendants failed to prove these allegations, however, relying on either hypotheses or unsubstantiated technical criticisms rather than empirical data. *Pennsylvania v. Local 542 Operating Engineers*, 469 F.Supp. at 370-375. Defendants also presented statistical evidence tending to rebut Plaintiffs' statistics. Because Defendants used an inferior method of analysis, and their results were not significantly different from Plaintiffs', the Court does not accord Defendants studies great probative value.

16. Plaintiffs attempted to support their statistical evidence with the testimony of several Black agents. This testimony did not serve its stated objectives; Defendants successfully rebutted the testimony at every turn. In no way does the testimony undercut the statistics, however, or rebut Plaintiffs' *prima facie* showing of disparate impact.

17. Defendants have not validated DEA's method of decision-making on grade at entry by showing that it has "a manifest relationship to the employment in question." *Furnco Const. Co. v. Waters*, 438 U.S. 579-80, 98 S.Ct. 2950-51, quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971); *see* Uniform Guidelines on Employment Selection Procedures, 43 Fed.Reg. 38297 (August 25, 1978); 28 C.F.R. § 50.14. Accordingly, this Court finds that Defendants have discriminated against Black agents with respect to grade at entry.

D. Work Assignments

18. It is unlawful employment practice for an employer to create a pattern of disparate work assignments based on race. The evidence in this case overwhelmingly indicates that DEA assigned Black agents to undercover work far more frequently than White agents. Defendants have even admitted that race is a factor in the allocation of work assignments. Plaintiffs have proven a *prima facie* case under both the the disparate impact and disparate treatment theories that Defendants discriminated against Black agents in work assignments.

19. Disproportionate assignment to undercover work adversely affects Black agents in that it exposes them to greater dangers and hardships, precludes obtaining the "breadth of experience" that is a critical consideration for promotion to supervisory positions, teaches a limited range of skills, and impairs their ability to remain current with administrative duties. Defendants have failed to articulate legitimate, non-discriminatory

reasons for the disparate pattern of work assignments. Defendants' general and untested assumption that Blacks must be used to make undercover buys from Blacks does not justify their discrimination. Defendants have not shown that race is a "bona fide occupation qualification reasonably necessary to the normal operation" of DEA. 42 U.S.C. § 2000e-2(e).

20. Assuming *arguendo* that Defendant's conjectural assumption proved accurate, the assignment of agents on the basis of race would still violate Title VII. The Act provides that it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). The Act further provides an exception to this proposition if the employer can show that his discrimination is based on a "bona fide occupational qualification." 42 U.S.C. § 2000e-2(e). Section 2000e-2(e) does not provide this exception for discrimination on the basis of color or race. Rather, it is limited to those circumstances where *religion, sex, or national origin* is a bona fide occupational qualification." (emphasis added). Thus, the Court concludes that Defendants have discriminated against Black special agents in work assignments.

E. Supervisory Evaluations

21. Plaintiffs' unrebutted evidence establishes that DEA's supervisory evaluation system has a disproportionate impact on Black agents and adversely affects their status as employees. This evidence is sufficient to make out a *prima facie* case of racial discrimination and to shift the burden to Defendants to demonstrate that their evaluation system has "a manifest relationship to the employment in question" *Griggs v. Duke Power Co.*, 401 U.S. at 432, 91 S.Ct. at 854.

22. When subjective evaluations are an important factor in the promotion process and are shown by statistical

evidence to have an adverse impact on Blacks, the inference arises that they discriminatorily affect promotions. Defendants must therefore demonstrate that they are related to job performance and are justified by business necessity. *U.S. v. Chicago*, 573 F.2d 416, 425 (7th Cir. 1978).

23. Defendants have failed to meet this burden. They did not and cannot demonstrate that the evaluation system is related to job performance or that it serves any legitimate business need. DEA does not have the information necessary to demonstrate this because it admittedly "has not, with respect to the position of special agent, undertaken a job analysis . . ." and "has not, with respect to the promotion criteria and standards for special agents undertaken any validation studies or reports or validity studies or reports . . . ." Absent such studies, Defendants cannot determine or demonstrate that the evaluation system is related to job performance. *U.S. v. Chicago*, 573 F.2d at 427-428. Defendants' supervisory evaluation process violates Title VII.

F. Discipline

24. Plaintiffs have shown and Defendant have admitted that Black agents at DEA are disciplined far more frequently than White agents, as measured against their representation in the DEA workforce. Plaintiffs have also shown that, of the agents who are disciplined, Blacks receive a significantly disproportionate share of the most severe punishments. The statistical evidence is itself sufficient to establish a *prima facie* case regarding discipline. *See Hazelwood School District v. U.S.*, 433 U.S. 307-308, 97 S.Ct. 2741-42. Moreover, the non-statistical evidence, including prior administrative findings of racial discrimination in discipline, support the inference of discrimination gleaned from the statistical evidence. *See Teamsters v. U.S.*, 431 U.S. at 339, 97 S.Ct. at 1856.

25. Defendants have not validated DEA's subjective disciplinary system by showing that it has a "manifest interest to the employment in question." *Furnco Const. Co. v. Waters*, 438 U.S. at 579-80, 98 S.Ct. at 2950-51; *Griggs v. Duke Power Co.*, 401 U.S. at 432, 91 S.Ct. at 849. They have performed no validity or validation studies, *see U.S. v. Chicago*, 573 F.2d at 425-428, and DEA's 1979 Affirmative Action Plan recognizes that DEA employees are disciplined differently for similar offenses. Plaintiffs have therefore proven that Defendants have discriminated against Black special agents with respect to discipline.

G. Promotions

26. Plaintiffs' statistical evidence did not establish a *prima facie* case regarding positions filled through the Career Board process. The statistics did establish, however, that a significant disparity exists in promotions from GS-11 to GS-12. The statistics involving promotions to GS-13 through GS-18 levels are insignificant, primarily due to the necessarily small number of agents considered in the regression analyses. Thus, the statistics alone did not establish a *prima facie* case of discrimination in promotions, with the exception of promotions from GS-11 to GS-12.

27. The non-statistical evidence firmly established discrimination in promotions, however. Work assignments, supervisory evaluations, and disciplinary actions all significantly affect an agent's promotional ability. In all of these areas, Defendants discriminated against Black agents. Thus, the Court concludes that Plaintiffs proved a *prima facie* case of discrimination in promotions.

28. Defendants failed to rebut Plaintiffs' showing of discrimination. They have validated neither the Career Board scoring system nor the non-competitive promotion procedures. *See U.S. v. Chicago*, 573 F.2d at 425-428. Thus the Court concludes that Defendants discriminated against Black agents in promotions.

H. Schedule A Appointments

29. Plaintiffs presented no probative statistical or testimonial evidence that Defendants' use of Schedule A appointments had a disproportionate impact on Black agents. They thus failed to prove a *prima facie* case in this area. The Court finds that Defendants did not discriminate against Black agents with their use of Schedule A appointments.

I. Training

30. Plaintiffs produced no statistical evidence regarding discrimination in training. The testimony of some Black special agents that discrimination in training existed at DEA was rebutted by the testimony of other Black special agents and defense witnesses. Plaintiffs have failed to prove that Defendants discriminated in training.

J. Harrassment and Reprisal

31. Plaintiffs have presented unsubstantiated allegations of harrassment and reprisal against Black agents for their efforts to promote equal employment opportunity at DEA. All testimony regarding specific acts of harrassment and reprisal was successfully rebutted by Defendants. Plaintiffs thus failed to prove the existence of harrassment and reprisal at DEA.

An appropriate Order follows this Opinion.

ORDER

Upon consideration of the Findings of Fact and Conclusions of Law entered this date and the entire record herein, it is by the Court this 6th day of February, 1981,

ORDERED, that JUDGMENT be and hereby is entered for Plaintiffs on their claims alleging discrimination against Black special agents regarding (a) salary, (b) grade at entry, (c) work assignment, (d) super-

visory evaluation, (e) discipline, and (f) promotion; and it is

FURTHER ORDERED, that Defendants shall cease such discrimination FORTHWITH; and it is

FURTHER ORDERED, that Defendants shall immediately commence validity studies in order to implement effective, non-discriminatory supervisory evaluation, discipline, and promotion systems; and it is

FURTHER ORDERED, that Defendants shall insure that said systems as operated have neither a disparate impact on Black agents nor effectuate disparate treatment of Black agents; and it is

FURTHER ORDERED, that JUDGMENT be and hereby is entered for Defendants regarding Plaintiffs claims of discrimination in (a) use of Schedule A appointments, (b) training, and (c) harrassment and reprisal; and it is

FURTHER ORDERED, that the parties shall indicate to the Court, on or before February 27, 1981, what action is necessary to remedy the discrimination in salary and grade at entry and further remedy the discrimination in promotion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-00081

No. 82-1541

HENRY W. SEGAR, ET AL.

v.

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL, ET AL., APPELLANTS

No. 82-1590

HENRY W. SEGAR, ET AL., CROSS-APPELLANTS

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL, ET AL.

Appeal and Cross-Appeal from the United States
District Court for the District of Columbia

[Filed June 22, 1984]

Before: WRIGHT, WALD, and EDWARDS, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part, vacated in part and these cases are remanded in part, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 22, 1984

Opinion for the Court filed by Circuit Judge Wright.

Concurring opinion filed by Circuit Judge Edwards

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-00081

No. 82-1541

HENRY W. SEGAR, ET AL.

v.

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL, ET AL., APPELLANTS

And Consolidated Case No. 82-1590

[Filed Aug. 29, 1984]

Before: WRIGHT, WALD, and EDWARDS, *Circuit Judges.*

ORDER

On consideration of the Petition for Rehearing of Appellants William French Smith, et al. (Appellants in No. 82-1541) it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-00081

No. 82-1541

HENRY W. SEGAR, ET AL.

v.

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL, ET AL., APPELLANTS

And Consolidated Case No. 82-1590

[Filed Aug. 29, 1984]

Before: ROBINSON, *Chief Judge*; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

The Suggestion for Rehearing *en banc* of Appellants William French Smith, et al. (Appellants in No. 82-1541) has been circulated to the full Court and a majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Wilkey and Bork would grant the Suggestion for Rehearing *en banc*

Circuit Judge Starr did not participate in this order.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-00081

No. 82-1541

HENRY W. SEGAR, ET AL.

v.

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL, ET AL., APPELLANTS

And Consolidated Case No. 82-1590

[Filed Sept. 6, 1984]

Before: ROBINSON, Chief Judge; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

It is ORDERED by the Court, *sua sponte*, that the *en banc* order of August 29, 1984 is amended by deleting the first footnote and substituting therefor the following:

> Circuit Judges Wilkey, Bork and Scalia would grant the Suggestion for Rehearing *en banc*.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-00081

No. 82-1541

HENRY W. SEGAR, ET AL.

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL, ET AL., APPELLANTS

No. 82-1590

HENRY W. SEGAR, ET AL., CROSS APPELLANTS

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL, ET AL.

[Filed June 26, 1984]

Before WRIGHT, WALD, and EDWARDS, *Circuit Judges.*

ORDER

It is ORDERED by the court, *sua sponte*, that the opinion for the court filed June 22, 1984 in the captioned

cases be, and it is hereby, amended by adding the following at the end of page 81:

ADDENDUM

On June 12, 1984, while the opinion in the instant case was in the printing stage, the Supreme Court issued its decision in *Firelighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 52 USLW 4767 (June 12, 1984). In considering the issues of appropriate remedies on remand, the District Court should, of course, consider the Supreme Court's opinion in *Stotts*, to the extent applicable. *See Tavoulareas v. The Washington Post Co.*, —— F.2d ——, —— (D.C. Cir. No. 83-1688, decided June 25, 1984) (Memorandum at 2) (In light of recent Supreme Court precedent, "[t]he most efficient course, and the course most respectful of the valid discretion of our district judge, is to remand for reconsideration").

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

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Office-Supreme Court, U.S.
FILED
MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWIN MEESE III, ATTORNEY GENERAL, *et al.*,
Petitioners,

v.

HENRY W. SEGAR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

JOHN H. PICKERING
WILLIAM T. LAKE *
CHARLES E. DAVIDOW
ROGER J. PATTERSON
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1666 K Street, N.W.
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March 27, 1985

* Counsel of Record

QUESTIONS PRESENTED

1. Whether the court of appeals erred in stating, in dictum, that an employer who seeks to rebut a prima facie case of disparate treatment in a class action under Title VII by identifying a job practice that causes the disparity may, in an appropriate case, have to show the business necessity of the practice in order to complete its rebuttal showing that the practice is a "legitimate, *non-discriminatory* explanation" for the disparity.

2. Whether the district court clearly erred in finding, under unquestioned principles of law, that plaintiffs' statistical analyses included all variables necessary to constitute probative evidence of disparities in salary and grade at entry between black and white employees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1200

EDWIN MEESE III, ATTORNEY GENERAL, *et al.*,
Petitioners,

v.

HENRY W. SEGAR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

1. The district court found, based on the evidence at trial, that the Drug Enforcement Administration (DEA) engaged in disparate treatment of its black special agents as a class in violation of Title VII of the Civil Rights Act of 1964,[1] which was reflected in substantial—and highly statistically significant—disparities in salary between similarly qualified white and black agents.[2] The court further found that five specific employment practices at DEA—initial grade assignments, work assignments, supervisory evaluations, discipline, and promotions—had un-

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[1] 42 U.S.C. § 2000e *et seq.* (1982).

[2] App. 106a-11a, 140a-41a.

lawful disparate impacts on black special agents.[3] Defendants ask this Court to review only two of those determinations: the findings of discrimination in salaries and initial grade assignments. They raise no issue with respect to the findings of discrimination in work assignments, supervisory evaluations, discipline, or promotions.

2. From the outset, the case proceeded on both disparate treatment and disparate impact theories.[4] Plaintiffs identified before trial each employment practice they challenged; and they presented evidence separately and independently on each.[5]

3. The two-week trial focused principally on the statistical evidence presented by both sides. To support their classwide disparate treatment claim, plaintiffs introduced a study of the salaries of black and white special agents that showed black agents to be earning about $3,000 less per year than whites, on the average. In order to discover whether and to what extent race explained that disparity, plaintiffs' experts (two professors of labor economics) formulated a multiple regression analysis based on a "human capital model." That approach, which the courts below found to be "widely accepted," builds on labor economists' findings that the human capital an employee brings to a job—such as education and experience—in large measure determines the employee's success.[6] In this case, objective and quantifiable information was available

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[3] App. 111a-18a, 141a-45a.

[4] *See* Plaintiffs' Final Pretrial Statement 1-12 (filed Mar. 30, 1979); Plaintiffs' Post-Trial Memorandum 1-12 (filed June 25, 1979); App. 138a-45a (dist. ct.), 19a-20a, 31a (ct. app.).

[5] *See* Complaint ¶¶ 12-13, 18-27; Plaintiffs' Final Pretrial Statement 1-8, 10-12 (filed Mar. 30, 1979); App. 106a-19a (dist. ct.), 7a, 9a-13a (ct. app.).

[6] App. 9a; *see, e.g.*, L. Thurow, Poverty and Discrimination (1969); S. Masters, Black-White Income Differentials: Empirical Studies and Policy Implications (1975).

for all DEA agents, from defendants' computerized records, on three important "human capital" factors: education, prior nonfederal experience, and prior federal experience (which included length of service at DEA when the salary measurements were taken). Plaintiffs' experts included those variables and race as the independent variables in their regressions.

The regressions showed that, as of October 1978, black agents were paid about $2,000 per year less than white agents on the average, even after differences in education and experience were accounted for. That disparity, and similar disparities for four other dates, were statistically significant at beyond the .001 level, indicating that "the probability of any of the above disparities happening by chance is less than one in a thousand." [7]

Plaintiffs also introduced separate and independent statistical analyses with respect to each of the specific employment practices alleged to have a disparate impact on black agents. Those analyses showed that blacks as a group were hired at a lower initial GS grade than similarly qualified whites, were assigned a disproportionate amount of undercover work, were evaluated much more severely by DEA's predominantly white supervisors, received more and harsher discipline, and received promotions more slowly than white agents at GS levels 11 and above.[8] These disparities were statistically significant at

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[7] App. 107a (dist. ct.); *see* App. 10a (ct. app.). To prove that the salary disparities were not caused by discrimination occurring before 1972 (when Title VII become applicable to defendants), plaintiffs presented a further analysis that included only agents hired after 1972. Even though most of the agents in that analysis had been with the agency a very short time, the analysis showed that, as of October 1978, there was a disparity of over $1,000 between black and white agents on the average, after differences in qualifications were taken into account. That disparity was significant at the .05 level. App. 107a (dist. ct.), 10a-11a (ct. app.).

[8] App. 111a-18a (dist. ct.), 12a (ct. app.).

high levels—some as high as .0001, corresponding to a probability of less than one in ten thousand that the disparities could have occurred by chance.[9]

Defendants challenged the reliability of plaintiffs' statistical analyses. In particular, defendants suggested that the analyses of salary and grade at entry were unpersuasive because they failed to account for the possibility that more of the white agents' prior experience than of the black agents' prior experience was in criminal law enforcement work.[10] Defendants pointed to Civil Service rules establishing requirements for entry at the GS-7 and GS-9 levels. All agents hired at GS-7 must have three years of "general experience" and one year of "specialized experience," both of which terms are defined in Civil Service documents.[11] The year of "specialized experience" must be in criminal investigative work or other compar-

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[9] *E.g.*, App. 116a.

[10] *See* App. 107a-09a, 112a-13a, 140a-41a (dist. ct.), 13a, 36a-37a (ct. app.).

[11] The Civil Service Commission Handbook defines "general experience" as:

> "[P]rogressively responsible experience which has required (1) ability to work or deal effectively with individuals or groups of persons; (2) skill in collecting and assembling pertinent facts; (3) ability to prepare clear and concise reports; and (4) ability and willingness to accept responsibility."

"Specialized experience" is defined as:

> "[P]rogressively responsible investigative experience which demonstrates (1) initiative, ingenuity, resourcefulness, and judgment required to collect, assemble and develop facts and other pertinent data; (2) ability to think logically and objectively, to analyze and evaluate facts, evidence, and related information, and arrive at sound conclusions; (3) skill in written and oral reports and presentation of investigative findings in a clear and concise manner; and (4) tact, discretion, and capacity for obtaining the cooperation and confidence of others."

App. 101a-02a (dist. ct.), 37a-38a (ct. app.).

able work.[12] The requirements for GS-9 are the same, except that an agent must have an additional year of "specialized experience," which need not be in criminal or comparable work.[13]

Defendants argued that the additional year of "specialized experience" was a "minimum objective qualification" for entry at GS-9 and that the failure to include that as a variable robbed plaintiffs' regressions of any probative force. However, as the courts below noted, defendants made no attempt to show that the disparities in salary and grade at entry were actually explained by a difference in "specialized experience." They presented no evidence that blacks even had less "specialized experience" than white agents.[14] To the contrary, defendants' expert testified that he collected what data he could from individual personnel folders on agents' prior law enforcement and military experience; but he did not even subject the data to statistical tests, because "it appeared to me that it's pretty even across the board in all those things" and "it didn't appear to me [that any disparities] could be explained by any of those factors."[15] Thus, the

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[12] *Id.*

[13] *Id.*

[14] *See* App. 107a-09a, 111a-13a, 140a-41a (dist. ct.), 40a-42a, 63a (ct. app.).

[15] Joint Exh. V (Spradlin Dep. I, at 26-27, 206-07, 209-42). Defendants' expert could not say whether the information he collected under the headings "law enforcement" and "military" experience fell within the Civil Service definition of "specialized experience." *Id.* at 227-30. One DEA official expressed the view that police experience would not satisfy the Civil Service criteria unless the applicant had spent at least 50% of his or her time in investigations requiring the use of investigative methods such as surveillance and assuming an undercover role. App. 120a.

DEA's expert did his own salary and grade-at-entry analyses, in which he did not include law enforcement or military experience—or any other qualifications. App. 113a. By contrast, plaintiffs' studies included all of the data on education, nonfederal experience, and

only evidence on this issue tended to show that "specialized experience" did *not* explain the disparities.

Defendants presented studies of their own with respect to salary, grade at entry, promotions, and discipline, in order to show an absence of discrimination. They relied chiefly on a "cohort analysis," which defendants say showed no disparity between black and white salaries.[16] To the contrary, when the cohort results were aggregated by a method defendants' expert admitted was proper, the analysis showed a disparity adverse to black agents that was significant at the .001 level.[17] The cohort analysis thus tended, if anything, to confirm plaintiffs' proof. Defendants presented no rebuttal studies with respect to work assignments or supervisory evaluations.

There was also extensive nonstatistical evidence on both sides. Plaintiffs presented the testimony of an industrial psychologist that defendants' systems for supervisory evaluations and promotions did not meet professional standards and that the deficiencies increased the likelihood that white supervisors might discriminate against nonwhites.[18] Plaintiffs also presented direct testimony by black agents with respect to DEA's general practices and specific instances of discrimination.[19] Defendants did not rebut the industrial psychologist's testimony; but they did present rebutting anecdotal testimony and evidence of DEA's efforts to achieve equal employment opportunity.[20]

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federal experience available from the Department of Justice's computerized personnel records. App. 106a, 111a (dist. ct.), 9a (ct. app.).

[16] Pet. 5.

[17] App. 60a-61a; *see* Tr. 1937, 2001-03; Plaintiffs' Exh. 53; Joint Exh. V (Spradlin Dep. II, at 16-23).

[18] Plaintiffs' Exh. 8; *see* App. 126a-30a, 143a-45a.

[19] App. 119a-32a, 136a-37a.

[20] App. 132a, 137a.

4. The district court, after receiving proposed findings from both sides, issued careful and extensive findings that adopted neither side's submission.[21] The court found that plaintiffs had proven disparate treatment of black special agents as a class, and also that each of the five specific practices listed above had a disparate impact on black agents.[22] The court evaluated the nonstatistical evidence together with the statistical showings and found that the evidence "firmly" and "overwhelmingly" established an inference of discrimination.[23] The court rejected defendants' attack on plaintiffs' salary and grade-at-entry analyses, finding that quantifying an agent's "specialized experience" was "impossible because the qualifications are all subjective in nature" and that defendants had produced no proof that there were any differences in such experience that could have caused the disparities between black and white agents.[24] DEA's assignment of black agents excessively to undercover work was found not only to have a disparate impact on black agents but also to constitute intentional disparate treatment.[25]

Shortly after the district court's decision, plaintiffs sought and the court granted a preliminary injunction to

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[21] App. 99a-147a.

[22] App. 140a-45a.

[23] App. 142a, 145a. The court found that defendants had rebutted much of plaintiffs' anecdotal testimony. App. 137a. However, contrary to defendants' assertion (Pet. 3, 6, 10), the court credited much of plaintiffs' direct evidence, with respect to the overall operation of DEA's practices as well as some specific instances of discrimination. App. 125a-32a, 136a-37a, 142a-45a (dist. ct.), 45a (ct. app.).

[24] App. 112a, 140a-41a.

[25] App. 142a-43a. With respect to three other challenged practices (training, reprisals, and the use of Schedule A appointments), the court found that plaintiffs had failed to carry their burden of proof. App. 146a-47a. Plaintiffs' claims with respect to hiring had been settled before trial. App. 100a.

prevent defendants from demoting Carl Jackson, the highest ranking black agent at DEA, who had been a chief witness for plaintiffs at the trial. The district court found, after a hearing, that Jackson was "very likely to prevail on the merits" of his claim that the demotion was in retaliation for his role at the trial, and that defendants' treatment of Jackson "epitomizes the main action." [26]

The district court later held further proceedings on relief and entered a relief order.[27]

5. The court of appeals affirmed the district court's liability findings but vacated the remedial order and remanded the case for further consideration of remedies.[28] The appellate court upheld the district court's finding that plaintiffs' salary and grade-at-entry studies accounted sufficiently for all "minimum objective qualifications" to be considered probative in determining whether plaintiffs had carried their ultimate burden of proof. It specifically upheld the district court's findings that the Civil Service definition of "specialized experience" is subjective and unquantifiable and that defend-

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[26] Memorandum Opinion dated May 5, 1981, at 8-9.

[27] In the relief proceedings, 2½ years after trial, defendants asked the district court to reopen the liability issue and receive further statistical analyses that DEA said would disprove liability. Those analyses contained only data that had been available at the time of trial; and they revealed on their face some of the same methodological errors that the district court found in defendants' evidence at trial. The court rejected the submission as "a belated attempt to relitigate issues the court resolved after extensive briefing, argument and consideration." Memorandum Opinion dated Feb. 17, 1982, at 3.

[28] Defendants do not seek review of any relief issues. Pet. 7 n.9. The court of appeals also affirmed the preliminary injunction barring the demotion of Carl Jackson. App. 79a-80a. Defendants do not seek review of that ruling.

ants failed to substantiate their hypothesis that such experience might be related to the proven disparities.[29]

In a prefatory discussion of Title VII principles, the court of appeals discussed "two ways" in which disparate impact issues may be involved in a disparate treatment class action:

> "First, in addition to bringing a pattern or practice disparate treatment claim, plaintiffs may well challenge the disparate impact of specific employment practices and thus force the employer to prove the job-relatedness of those practices." [30]

The court observed that this is such a case, and analyzed it as such.[31]

Second, even where plaintiffs make only a classwide disparate treatment claim, disparate impact analysis may become implicated as the result of the employer's successful showing, in rebuttal, that a specific employment practice caused the perceived disparity. As the court noted, in making such a showing the employer will have proven that the practice is prima facie discriminatory under a disparate impact theory. In such a case, the court said, the employer may complete its rebuttal just as it would in a disparate impact case: by showing the business necessity of the practice causing the disparity. The court recognized that this case does not fall in that second category, because defendants made no showing that the requirement of a second year of "specialized experience" had any relationship to the observed disparities in salary and grade at entry.[32] That discussion of what this case does not involve is the chief focus of the petition.

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[29] App. 39a-41a.

[30] App. 19a.

[31] App. 19a-20a, 31a-32a; *see* 34a-64a.

[32] App. 61a-66a; *see id.* 36a-42a.

REASONS FOR DENYING THE WRIT

Defendants ask this Court to review a dictum in the court of appeals' opinion whose correctness—as the court below acknowledged—could not possibly affect the outcome of this case. Grudgingly admitting that the matter is "alternative holding or dictum in this case," [33] defendants nonetheless try to make it seem relevant here by distorting the record and findings below. When the distortions are stripped away, all that is left is a question of evaluation of the evidence—a question on which, after careful consideration, the two lower courts have concurred.[34] Moreover, even if the challenged dictum were a holding, it would be consistent with established law and would have none of the crippling effects defendants assert.[35] Defendants' strained predictions about what that dictum might lead other courts to do in circumstances not presented here provide no reason for review of this interlocutory ruling in this litigation.

1. Defendants portray this case as a disparate treatment case transformed, by a stroke of the court of appeals' pen, into a disparate impact case; and they suggest that DEA was, as a result, unfairly required to prove the business necessity of the Civil Service requirement for entry at GS-9.[36] That portrayal is simply wrong. Plaintiffs presented disparate impact claims from the outset of the litigation, in addition to their classwide disparate treatment claim. The complaint identified specific employment practices at DEA that plaintiffs claimed, and later proved, operated discriminatorily with respect to black special agents.[37] The district court

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[33] Pet. 20.

[34] Defendants admit that this evaluation of evidence involves application of a "rule of reasonableness" and that the result "will depend on the facts of each case." Pet. 24-25.

[35] *See* Pet. 20.

[36] *See* Pet. 2-3 n.2, 14 n.16, 19.

[37] *See* authorities cited in notes 4-5 *supra*.

made, and the court of appeals affirmed, findings that five specific employment practices at DEA had disparate impacts on black agents.[38] Indeed, defendants raise no issue with respect to most of those disparate impact findings.[39]

2. Defendants' rebuttal of plaintiffs' classwide disparate treatment claim never reached the point at which a need to show business necessity might have arisen. This case was not decided on the ground that defendants failed to show the business necessity of the requirement of an extra year of "specialized experience" for entry at GS-9. That issue never arose, because defendants never showed that the requirement had anything to do with the disparities proven by plaintiffs.

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[38] App. 140a-45a (dist. ct.), 19a-20a, 31a (ct. app.). Defendants are therefore wrong in asserting (Pet. 2-3 n.2, 14 n.16) that neither court below applied disparate impact analysis to plaintiffs' claims except in the court of appeals' dictum about rebuttal methods.

All statistical showings on which the district court based its findings were significant at the .05 level or better. Defendants suggest that disparities significant at the .05 level are not probative unless they also satisfy the rough four-fifths rule mentioned in the federal Uniform Guidelines. Pet. 14-15 n.16. But the guidelines recognize that the four-fifths rule does not replace the concept of statistical significance; and they adopt the .05 standard as sufficient in this area, as do social scientists and courts generally. Indeed, defendants' own experts supported the .05 standard. *See* Uniform Guidelines on Employee Selection Procedures §§ 4(D), 14(B)(5), 43 Fed. Reg. 38290, 38297, 38301 (1978); 28 C.F.R. § 50.14 (1984); App. 118a (dist. ct.), 10a, 53a (ct. app.).

[39] Defendants incorrectly suggest that the lower courts declined to apply disparate impact analysis to those five employment practices because the practices are not proper subjects for such analysis. Pet. 2-3 n.2. To the contrary, the court of appeals correctly noted that "disparate impact appropriately applies to them." App. 64a-65a; *cf. Board of Education v. Harris*, 444 U.S. 130, 151 (1979) (disparate impact analysis applied to teacher assignments in setting analogous to Title VII). Indeed, defendants never challenged below the propriety of applying disparate impact analysis to those practices. App. 64a-65a.

Both courts below found that defendants produced not a shred of evidence that a difference between the races in "specialized experience" even existed, let alone that it explained the disparities proven by plaintiffs.[40] In fact, the only evidence on the issue, from defendants' own expert, was that no such difference existed.[41] The court of appeals expressly did *not* impose on defendants a duty to prove the business necessity of the Civil Service criterion for GS-9, because defendants had failed to substantiate a rebuttal based on that criterion. The court said that, "*even had* DEA succeeded" in rebutting plaintiffs' case, a requirement to show business necessity might have arisen.[42] Since it did not, review by this Court of the court of appeals' dictum about business necessity could have no effect on the outcome of this case.[43]

3. What this case did turn on was the trial court's conclusion that plaintiffs carried their ultimate burden of proof, on both disparate treatment and disparate impact. This Court has recently reminded the lower courts that, once all the evidence is in, a Title VII case is like any other: The trier of fact must weigh all of the plaintiff's and defendant's evidence and decide whether plaintiff has carried his burden of persuasion. *United States Postal Service Board of Governors v. Aikens*, 460 U.S.

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[40] App. 140a-41a (dist. ct.), 40a-42a, 63a-64a (ct. app.).

[41] *See* note 15 *supra* and accompanying text.

[42] App. 65a (emphasis added). *See also* App. 65a-66a ("In this situation the trial court *would* properly have applied the disparate impact analysis. . . ."); *id.* 66a (*"Had DEA made a credible showing* . . . DEA would have been required. . . ."); *id.* ("even had DEA succeeded") (all emphasis added).

[43] The Court declines to grant certiorari in these circumstances. *E.g., Belcher v. Stengel*, 429 U.S. 118 (1976); *Cichos v. Indiana*, 385 U.S. 76 (1966); *Smith v. Butler*, 366 U.S. 161 (1961); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); *Sanchez v. Borras*, 283 U.S. 798 (1931).

711, 714-15 (1983). The trial court did precisely that here: It considered defendants' expert's opinion on the persuasiveness of plaintiffs' regression analyses in light of the views of plaintiffs' experts, the subjectivity of the requirement of "specialized experience," the difficulty of obtaining quantifiable evidence of such experience, defendants' failure even to try to show that a difference in "specialized experience" caused the disparities, and the admission by defendants' expert that there seemed to be no difference between blacks and whites in prior law enforcement experience. After weighing all of the evidence together, the court found plaintiffs' proof to be persuasive. The court of appeals, carefully following *Aikens*, upheld the findings as not clearly erroneous.[44] Such concurrent findings of fact by two lower federal courts are not appropriate material for review by this Court.[45]

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[44] App. 33a-34a & n.20, 61a-65a. This Court recently reemphasized the deference owed to a trial court's factual findings. *Anderson v. Bessemer City*, 53 U.S.L.W. 4314 (U.S. Mar. 19, 1985) (No. 83-1623).

[45] *See Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *cf. Rudolph v. United States*, 370 U.S. 269, 270 (1962); *General Talking Pictures Co. v. Western Electric Co.*, 304 U.S. 175, 178 (1938); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). *See also Texas v. Mead*, —— U.S. ——, 104 S. Ct. 1318 (1984) (Stevens, J.).

There is no conflict among the circuits on any matter related to this issue. In *Bazemore v. Friday*, 751 F.2d 662 (4th Cir. 1984), the Fourth Circuit affirmed (applying the "clearly erroneous" test, *id.* at 668) a district court ruling that a specific statistical analysis did not suffice because it failed to include certain variables. Neither the analysis nor the omitted variables were analogous to those that the district court accepted in this case.

In *Bazemore*, the study sought to explain salary differentials among state employees in various counties in North Carolina. The district court had concluded, on the basis of evidence before it, that the plaintiffs' study was not persuasive because it failed to take

4. Finally, the dictum of the court of appeals to which defendants object is entirely consistent with established Title VII law and will not cause the horrible consequences defendants predict. Defendants assert that the court placed on them a burden beyond that permitted by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). They are mistaken. The burden placed on employers by *Burdine* is to articulate a "legitimate, *nondiscriminatory* reason" for an observed disparity.[46] If an employer shows only that one of his employment practices caused the observed classwide disparity, he will not have met this burden because the practice will be prima facie *discriminatory* under this Court's holdings. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). The need for proof that the employment practice is motivated by business necessity is inherent in, not inconsistent with, the burden imposed by *Burdine*.

This Court has stressed that the prima facie method of structuring a Title VII trial "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *see United States Postal Service v. Aikens*, 460 U.S. 711, 715 (1983). The

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account of across-the-board pay raises in some counties, which were nondiscriminatory but would have the effect in the analysis of magnifying existing disparities in salary. *Id.* at 672. It also found that the study failed to exclude pre-Title VII discrimination. *Id.* There were no comparable omissions from the analyses provided by plaintiffs in this case.

The D.C. Circuit's approach to determining the adequacy of a regression analysis is very similar to the Fourth Circuit's. *See Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982); App. 35a-42a. And the two courts applied the same "clearly erroneous" test in affirming the trial courts' findings here and in *Bazemore*.

[46] 450 U.S. at 254 (emphasis added). *See also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

rule suggested by the court of appeals' dictum in this case is no more than a way of avoiding a needless procedural wrangle in cases implicating both disparate treatment and disparate impact analysis—a wrangle that, we emphasize, did not arise here.

Nor does the dictum conflict with Title VII law as established in other circuits. The court of appeals did say that it disagreed with certain language used with respect to disparate impact cases in *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800 (5th Cir. 1982), and *Rivera v. City of Wichita Falls*, 665 F.2d 531, 539 (5th Cir. 1982).[47] But the holdings in those cases are not inconsistent with either the holding here or the court of appeals' dictum about rebuttal burdens. In those cases, the plaintiffs did not prove disparate treatment[48] or prove that specific practices had disparate impacts. They merely complained of an overall salary disparity not amounting to disparate treatment, and asserted without proof that the observed disparity was caused by defendants' practices. The *Pouncy* and *Rivera* courts held that defendants would not be required to validate employment practices that had not been proven to have disparate impacts.

Those rulings are wholly consistent with the liability ruling here, where plaintiffs proved disparate treatment *and* separately proved that each of five specific employment practices had a disparate impact on the plaintiff

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[47] App. 29a-30a.

[48] In *Pouncy*, plaintiffs failed in an attempt to prove disparate treatment. The district court found, and the Fifth Circuit affirmed, that their statistics, which merely compared the average salaries of blacks and whites with no control for different educational or employment backgrounds, failed to raise an inference of disparate treatment. *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 802-03. The portion of the plaintiffs' claim in *Rivera* that led to the Fifth Circuit's language did not implicate disparate treatment. *Rivera v. City of Wichita Falls*, 665 F.2d 531, 539 (5th Cir. 1982).

class. They are also consistent with the court of appeals' dictum about a defendant's burden in rebutting a prima facie case of disparate treatment. Where a prima facie case has been proven, if the defendant does not offer a rebuttal, the plaintiff will have established liability. If the defendant, in rebuttal, shows that one of his employment practices caused the disparity, then that specific practice has been shown to have a disparate impact. A requirement to validate that practice then arises, and that requirement does not conflict with the holdings in *Pouncy* and *Rivera*.[49]

Defendants' worries about the consequences of the court of appeals' dictum are similarly unfounded. The requirement to show the business necessity of a practice that has a disparate impact is not an excessive burden on the employer; it is precisely the requirement imposed on every employer when disparate impact has been shown. Indeed, plaintiffs would generally have the freedom to amend their complaint to state a disparate impact claim in the circumstances hypothesized by the court of appeals, under the liberal rules of Fed. R. Civ. P. 15.[50] Nor is there any defect of notice, because the

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[49] Neither of the other two court of appeals decisions on which defendants rely is even remotely inconsistent with the decision below. Both *Mortensen v. Callaway*, 672 F.2d 822 (10th Cir. 1982), and *Pope v. City of Hickory*, 679 F.2d 20 (4th Cir. 1982), were individual, and not class, actions. Neither involved an explanatory defense. Each stands for the unchallenged proposition that a disparate impact claim cannot be stated in the absence of a specific employment practice asserted to cause disparate impact.

[50] *See, e.g., EEOC v. H.S. Camp & Sons, Inc.*, 542 F. Supp. 411, 418-19 (M.D. Fla. 1982) (allowing amendment of complaint to conform to evidence after trial, to include claims of discrimination in areas not stated in original complaint); *Isaac v. Butler's Shoe Corp.*, 511 F. Supp. 108, 112-13 (N.D. Ga. 1980) (allowing amendment of complaint to include claim of disparate impact in denying motion to dismiss). *See generally Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962).

defendant will generally have notice early on by virtue of its own decision to present an explanatory defense. The opinions below leave ample room to accommodate any case in which a defendant does not in fact have adequate notice of the need to show business necessity.[51]

There is nothing to support defendants' bare assertion that the dictum below will "circumvent the possibility of conciliation." During any attempts at conciliation, defendants should be able to anticipate that they will or might raise a defense of a practice motivated by business necessity, and they are thus in no different position than any defendant today attempting to conciliate a disparate impact claim. For the same reason, the ruling will not impair any of the goals of the requirement of exhaustion of administrative remedies. All elements of the claim are available to be resolved during the administrative process, and the employer's defenses as well as the plaintiffs' claims should be aired there to avoid prejudice to the plaintiffs at trial.

Finally, the situation hypothesized by the court of appeals is unlikely to arise often. It would arise only when a defendant in a disparate treatment class action asserts as an explanatory defense a practice that has not been challenged directly by the plaintiffs. Plaintiffs in this case did not overlook their opportunity to challenge specific practices believed to have disparate impacts, and there is no reason to think that Title VII plaintiffs generally would do so.

In short, defendants' parade of horribles does not establish a need for this Court to issue what would be an advisory opinion in this case. As this Court said in *The*

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[51] The court of appeals' analysis was stated in terms of what would "typically" occur, and Judge Edwards in concurrence stressed that the approach described by the court would apply only "[s]o long as the defendant has adequate notice of the need to prove business necessity." App. 27a, 97a.

Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959), review by this Court of the consequences defendants fear "can await a day when the issue is posed less abstractly."

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 84-1200

In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWIN MEESE, III,
ATTORNEY GENERAL, ET AL., PETITIONERS

v.

HENRY W. SEGAR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

1. Respondents contend (Br. in Opp. 2-3) that "[F]rom the outset, the case proceeded on both disparate treatment and disparate impact theories", and allege that we inaccurately portray this case as one in which "a disparate treatment case [has been] transformed, by a stroke of the court of appeals' pen, into a disparate impact case" (Br. in Opp. 10). It is true, as we acknowledged in our petition (at 2 n.2), that respondents labeled several of their claims as involving disparate impact. The courts below did not dispute these labels, although respondents did not identify any test or other employment selection criterion as the basis for their claims.[1] Those claims were presented, and treated by the

[1]In their response to our petition, respondents state that they "identified before trial each employment practice they challenged * * *[, and] presented evidence separately and independently on each" (Br. in Opp. 2). But both their citation of authority and the response itself reveal

courts, largely on the basis of the same kind of statistical evidence that underlay the disparate treatment claims. The argument put forth by respondents and incorrectly accepted by the courts below was that such evidence, if sufficient to establish a disparate treatment claim, is *a fortiori* sufficient

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that the "employment practice[s]" to which they refer are "initial grade assignments, work assignments, supervisory evaluations, discipline, and promotions" (Br. in Opp. 1), and the evidence presented as to each was simply statistical comparisons of the cumulative effect of each of these on blacks and whites (see, *e.g.*, Pet. App. 106a-119a). As the Fifth Circuit explained in *Pouncy* v. *Prudential Insurance Co.*, 668 F.2d 795, 801-802 (1982):

> The disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the work force. Aptitude tests, height and weight requirements, and similiar selection criteria all may be shown to affect one class of employees more harshly than another by controlling for the impact of the employment practice on one class in the employer's work force so that it can be measured. For example, in *Griggs* [v. *Duke Power Co.*, 401 U.S. 424 (1971)] the plaintiff proved not just a racial imbalance in the employer's work force, but also that the employer's educational requirement resulted in disqualifying a higher percentage of black employees than white employees. 401 U.S. at 430 n.6 * * *. In an action challenging an employer's height and weight requirements, the plaintiff demonstrated that, as compared to men, a disproportionate number of women were automatically disqualified from obtaining jobs as corrections counselors. *Dothard* [v. *Rawlinson*], 433 U.S. [321,] at 329-30 & n.12 * * * [1977].
>
> By contrast, Pouncy has not shown, nor can he show, that independent of other factors the employment practices he challenges [the failure to post job openings and the reliance on in-house promotions and subjective employee evaluation criteria] have caused the racial imbalance in Prudential's work force. The statistics presented by the appellant do show that, on the whole, blacks are over-represented in the lower levels of Prudential's work force. But this might result from any number of causes. Absent proof that the disparate impact is caused by one or more of the challenged employment practices, we do not require the employer to justify the legitimacy of any (or all) employment practices.

to show disparate impact (Pet. App. 139a, 19a-20a, 31a; Plaintiffs' Post-Trial Memo. 8-11). It is precisely this blurring of the difference between disparate impact and disparate treatment analysis that, we submit, merits review by this Court (see Pet. 16-17).

Indeed, the need for this Court's review has not been highlighted by *Griffin* v. *Carlin,* No. 84-3070 (Mar. 28, 1985), in which the Eleventh Circuit agreed with the analysis of the instant court, and directed the district court, on remand, that "defendants may not rebut [a] presumption of discrimination by reliance on [neutral selection procedures] unless those procedures have been validated as required under a disparate impact analysis" (slip op. 2781).[2] That decision thus confirms our prediction (Pet. 20) that the rule announced by the court below will have an immediate adverse impact on the orderly conduct of Title VII litigation.

2. Respondents incorrectly assert (Br. in Opp. 15) that the decision below is consistent with established Title VII principles. But in fact, this Court has emphasized (*Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n.13 (1977), citing *Mayor* v. *Educational Equality League*, 415 U.S. 605, 620-621 (1974)) that comparative statistics are competent only when they take into account the special qualifications for the position in question. By ignoring the specialized experience required of persons hired at the GS-9 level, the courts below relied on statistical evidence that failed to establish a prima facie case, because it failed to reflect the relevant basic objective job requirements.

3. Finally, respondents' repeated assertions (Br. in Opp. 5, 11, 12) that petitioners cannot prevail because they failed to introduce evidence to support their claims reflect a basic

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[2]We are lodging 10 copies of the *Griffin* decision with the clerk of this Court.

misapprehension of the applicable burdens of proof. Since, as we have explained in our petition (at 20-27), respondents' statistical evidence had no significant probative value, petitioners should not have been required to assume the burden of establishing the existence of disparities in specialized experience among blacks and whites to justify the differences in entry level grades.[3] In any event, it is inaccurate to assert that petitioners "produced not a shred of evidence that a difference between the races in 'specialized experience' even existed, let alone that it explained the [statistical] disparities" (Br. in Opp. 12). The relevance of disparities in experience was not initially apparent; it was raised at trial by the inadequacy of respondents' statistics. When the burden of showing that the difference in experience explained the statistical disparity was improperly placed on the defendants, we met and carried that burden by demonstrating that the differences in initial placement allegedly attributable to race were, in fact, due to varying amounts of prior job related experience (see Pet. 9-10).

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

APRIL 1984

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[3]Respondents' quotation (Br. in Opp. 5) from petitioners' expert witness Spradlin is taken out of context. Spradlin was explaining his use of cohort analyses, in which the employment history of employees who enter at the same grades are compared. In context, therefore, he was simply stating that there did not appear to be significant disparities among various individuals who were hired at grade 7, or among those hired at grade 9. He was not considering the differences between those hired at grade 9 and those hired at grade 7, or whether whites were more likely than blacks to have the extra year of specialized experience required for entry at grade 9.